85-1954

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR., RICARDO TREVINO, JR.,

Petitioners

V.

T. L. HARVILLE, LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY, W. M. LAUGHLIN, ARNOLDO GONZALEZ, CHARLES HARLESS, ZARAGOSA GARCIA, JR., J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether plaintiff minority voters who successfully prosecute an action under Section 5 of the Voting Rights Act are entitled to attorney's fees for services rendered in an ancillary preclearance proceeding through which the minority voters obtain their litigation objective of the enactment of a non-discriminatory redistricting plan.

LIST OF ALL PARTIES IN LOWER COURT PROCEEDINGS

The following is a list of all the parties to the proceedings in the Court whose judgment is sought to be reviewed.

1. Alfredo R. Arriola, Miguel V. Ramirez, Jr. and Ricardo Trevino, Jr., Plaintiffs and Petitioners herein.
2. T.L. Harville, Lucilla De Leon, C.W. "Dinky" Price, J.B. Freiley, W.M. Laughlin, members of the Jim Wells County Commissioners' Court, Defendants and Respondents, herein.

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ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR.

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Petitioners,

v.

T.L. HARVILLE, LUCILLA DE LEON, C.W.

"DINKY" PRICE, J.B. FREILEY,

AND W.M. LAUGHLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT OF

APPEALS FOR THE FIFTH CIRCUIT

The petitioners Alfredo R. Arriola, Miguel V. Ramirez, Jr., and Ricardo Trevino, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 31, 1986.

OPINION BELOW

The opinion of the Court of Appeals is reported, Alfredo R. Arriola, et al. v. T.L. Harville, 781 F.2d 506 (5th Cir. 1986), and appears in Petitioners' Appendices (Pet.App. at 1a). The opinion by the District Court for the Southern District of Texas rendered on April 19, 1984, is not reported and appears in the Appendices (Pet.App. at 38a).

JURISDICTION

The judgment of the Court of Appeals

for the Fifth Circuit was entered on January 31, 1986. A timely petition for rehearing en banc was denied on February 27, 1986, (Pet.App. at 54a) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1). The District Court's jurisdiction was invoked pursuant to the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, and the Voting Rights Act, 42 U.S.C. Sec. 1973 c.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 42, Section 1973 c: The statute is reproduced in the Appendices (Pet.App. at 62a).

United States Code, Title 42, Section 1973 l (e): The statute is reproduced in the Appendices (Pet.App. at 67a).

United States Code, Title 42, Section

1988: The statute is reproduced in the Appendices (Pet.App. at 68a).

Fourteenth and Fifteenth Amendments to the United States Constitution: The Amendments are reproduced in the Appendices (Pet.App. at 60a and 61a).

STATEMENT OF THE CASE

Petitioners are Mexican American residents of Jim Wells County, Texas. Plaintiffs, and Petitioners herein, filed this action to enforce Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973 c. This action successfully prevented the continued implementation of a 1975 districting plan for the Jim Wells County Commissioners' Precincts. The 1975 districting plan discriminated against the Mexican American community in Jim Wells County by fragmenting its voting strength. Through that action, Petitioners, ultimately, succeeded in replacing a

discriminatory districting plan for the Jim Wells County Commissioners' Court. The new districting plan provides a meaningful opportunity for the Mexican American community to elect candidates of their choice.

1. Background of Petitioners' Section 5 Action.

Jim Wells County is governed by a Commissioners' Court. Each of the four Commissioners is elected from one of the four Commissioner's Precincts. According to the 1980 federal census, Jim Wells county has a population of 36,498 of whom 24,519 or 67.18% are Mexican Americans. Prior to the action below, there had never been more than one Mexican American County Commissioner out of the total of four County Commissioners.

Section 5 requires a covered

jurisdiction, such as Jim Wells County, to submit any changes affecting the right to vote for approval to the United States District Court for the District of Columbia or alternatively to the United States Attorney General. The covered jurisdiction must demonstrate that a proposed change in voting does not have a discriminatory effect and was not adopted pursuant to a discriminatory purpose. Election changes which have not secured the requisite Section 5 approval cannot be implemented. McCain v. Lybrand, 465 U.S. 236, 244-245, 104 S.Ct. 1037, 1043-1044, 79 L.Ed.2d 271, 278-279 (1984) ("Statutory provisions constituting changes in election practices are not 'effective as laws until and unless [they are] cleared pursuant to Sec. 5.' "). In 1974, in response to other federal court litigation, Jim Wells County adopted and

submitted to the District Court a redistricting plan for Commissioner Precincts in Jim Wells County. (R. Vol. 1, p. 200)[1] Thereafter, on July 11, 1975, the County again redrew its Commissioner Precincts lines. (R. Vol. 1, p. 198) Subsequently, the 1975 plan was submitted to the Attorney General for Section 5 review.

Petitioners submitted a written comment[2] objecting to the 1975 plan. (R. Vol. 1, px. #17, p.2) Petitioners urged the Attorney General to object to the 1975 plan. Petitioners referred to the 40% population deviation, the retrogressive impact on minority voters when compared to

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[1] Citations in this form are to pages of the Record on Appeal.

[2] According to 28 C.F.R. Sec. 51.27, (Pet.App. 70a) individuals or groups can forward written comments to the Attorney General providing information concerning the change affecting voting.

the previous plan, the over-concentration of Mexican American voters into one precinct, and the availability of alternative plans which did not dilute the minority voting strength. (R.Vol. 1, px #17) The Attorney General issued a letter of objection[3] approximately two weeks after receipt of Petitioners' comment based upon three of the four factors listed in Petitioners' written comments. (R. Vol. 1, px # 18)

2. Petitioners' Section 5 Action.

The County continued to use the 1975 districting plan in elections for County

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3 According to 28 C.F.R. Sec. 51.39 (d), (Pet.App. at 71a) the Attorney General can object to a proposed voting change if the submitted change does not meet the Section 5 burden. The Attorney General meets this regulatory requirement by issuing a letter of objection. Georgia v. United States, 411 U.S. 526, 529-530, 93 S.Ct. 1702, 1705, 36 L.Ed.2d 472, 478 (1973).

Commissioners, despite the letter of objection. To protect their rights, Petitioners instituted this suit to enforce Section 5 of the Voting Rights Act. The complaint sought an injunction against the 1975 districting plan. In addition, Petitioners sought the adoption and implementation of a districting plan in compliance with the Fourteenth Amendment to the United States Constitution and the Voting Rights Act. (R. Vol. 1, pp. 272-73, R. Vol. 2, p.17) The ultimate objective of the action was the adoption of a districting plan which would have three Commissioners' Precincts each with a 65% Mexican American population. (R. Vol. 2, pp. 12, 75)

Since the 1975 districting plan had not secured the requisite Section 5 approval, a statutorily convened three judge Court on October 15, 1979, issued an

injunction barring continued implementation of the plan. (R. Vol. 1, p. 197) The Order also enjoined the use of the pre-existing 1974 plan until that plan, a court-approved plan, was also submitted for Section 5 preclearance. See, McDaniel v. Sanchez, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981). The 1974 pre-existing plan replaced an earlier plan which had also been held unconstitutional by a prior federal court decision. With the issuance of the October 15, 1979, Order, therefore, the County of Jim Wells could not conduct any elections for County Commissioners since there was no valid districting plan. The case remained pending before the District Court, but no further substantive proceedings on the merits occurred after Petitioners obtained the injunction.

3. Rejection of the 1979 and

1980 Proposed Redistricting Plans by the Attorney General.

After the issuance of the injunction, the county submitted two redistricting plans (1979 and 1980 plans) to the United States Attorney General for Section 5 approval. The county's first two plans did not include three Commissioners' Precincts each with a 65% minority population. Petitioner opposed these plans and urged rejection of these plans as racially gerrymandered. (Transcript of Proceedings Jan. 5, 1983, pp. 22-24)

During this administrative process, Petitioners submitted written comments and forwarded alternative plans to the Attorney General. The alternative plans created three County Commissioners' Precincts each containing a 65% minority population. As noted by the Court of

Appeals, the Petitioners' involvement in this ancillary administrative proceeding was significant: "In addition to submitting proposed plans, MALDEF undertook other activities in connection with the preclearance process, primarily lobbying with county and federal officials." (Pet.App. at 4a - 5a)

The Attorney General disapproved these two redistricting plans. (Transcript of Proceedings Jan. 5, 1983, pp. 61-62) In the letters of objection, the Attorney General cited the same reasons urged in the comments submitted to the Department of Justice by the Petitioners.[4]

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4 The letter of objection for the 1979 plan listed as reasons, the discrepancies in the data provided by the County, the presence of racially polarized voting, the distribution of the Mexican American population among all four precincts, and the lack of participation from the Mexican American population,

During the development of the 1979 and 1980 plans, Petitioners presented alternative plans to the County and urged the creation of a plan that contained three 65% Mexican American commissioner precincts. (R. Vol. 1, px #5 entries 11-6-79 through 11-26-79; id. px# No. 8 and px# No. 12 entries 10-26-79 through 1-16-80; and id. px# No. 13) In some

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especially the only current Mexican American Commissioner. (R. Vol. 1, px # 22) Three of those reasons were based upon Petitioners' comment. (R. Vol. 1, px # 21) Testimony at the fee hearing reveals that the M.A.L.D.E.F. paralegal, Dianne Ross, actually called the problem, concerning the discrepancy in data submitted by the County, to the attention of the Department of Justice analyst. (R. Vol. 2, p. 108-109)

The letter of objection for the 1980 plan listed as reasons, the division of the Mexican American community of South Alice into four Precincts, the availability of alternative plans which did not fragment the Mexican American community, and the absence of community input into the redistricting process. (R. Vol. 1, px # 24) The letter of objection relied upon the same reasons urged by Petitioners' comment. (R. Vol.1, px # 23)

instances, Respondents requested the staff of Petitioners' attorneys to develop alternatives and modifications of the plans being reviewed by them. (R. Vol. 2, pp. 111-112) Petitioners' attorneys and staff attended Commissioners Court hearings, met with individual commissioners, and secured community input for the process. (R. Vol. 1, px #12 entries from 3-21-80 to 8-12-80)

The County, being without a valid plan to conduct elections as scheduled for Commissioners, simply did not hold elections in November, 1980. (R. Vol. 2, p. 61) Once the 1980 elections had passed, all the parties waited until the publication of the 1980 census data to begin anew the redistricting process. (R.Vol. 2, p.11) Again Petitioners' representatives made extensive presentations to the County Commissioners

in an effort to convince the County to adopt a plan with three 65% Mexican American Precincts, met with individual members of the Commissioners Court, met with the County Attorney in Alice and in San Antonio, and reviewed and analyzed plans for the County and interested community members. (R. Vol. 2, p. 106; R. Vol. 1, px #1-15) Petitioners also developed a new plan using 1980 census data. (R. Vol. 2, p. 111; R. Vol. 1, px #4 entries from 6-11-81 to 8-13-81; R. Vol. 1, px #12 entries from 6-9-81 to 10-7-81)

4. <u>The 1981 Redistricting Plan.</u>

The 1981 county plan was a significant improvement over the previous plans. For the first time the County adopted a plan with three 65% Mexican

American Precincts.[5] The County's plan was similar to the plan presented by the Petitioners.[6] The Attorney General approved the 1981 plan. The 1981 plan is the County's current plan.

Once approval of the 1981 districting plan was secured, Petitioners accomplished the objective of their lawsuit: the

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[5] Although Petitioners again opposed this plan, it was primarily based on the fact that an activist Mexican American potential candidate was placed in the only non-Mexican American district. Moreover, such opposition should not foreclose a determination that plaintiffs prevailed at remedy. See, e.g., Commissioner Court of Medina County v. United States, 719 F.2d 1179, 1181 n. 3 (D.C.Cir. 1983).

[6] Petitioners' plan contained three Precincts with Mexican American populations over 65% as did the County's plan. The Petitioners plan's strongest Mexican American Precinct was approximately 80% Mexican American (Pct.4). The County's strongest Mexican American Precinct was approximately 81% (Pct.4). Moreover, the other two Mexican American Precincts are well over the 65% Mexican American population threshold in both plans. (R. Vol. 1, px # 26a & 25a)

approval and implementation of a districting plan containing three Commissioners' Precincts each having a 65% minority population.

5. Attorney's Fees Proceedings.

After the 1981 plan was approved, Petitioners filed their Motion for Attorney's Fees on May 19, 1982. (R. Vol. 1, p. 191) The motion was filed pursuant to 42 U.S.C. Sec. 1973 l (e). On April 19, 1984, the District Court issued a judgment awarding attorney's fees to Petitioners. (R. Vol. 1, p. 40) The award provided for compensation for work performed prior to the issuance of the October 15, 1979, injunction. However, the District Court denied any award for the services rendered by Petitioners' attorneys in their successful efforts in the Section 5 proceedings before the

United States Attorney General to secure disapproval of the 1979 and 1980 districting plans. (R. Vol. 1, pp. 42-43, 44-45) (Pet.App. at 35a) The amount of the rejected hours was significant. The Court rejected 58.2 hours of attorney time. In addition the Court disallowed 378.9 hours of paralegal time. (R. Vol. 1 pp. 42-45)

The Court of Appeals for the Fifth Circuit affirmed the District Court's denial of attorney's fees for services rendered during the ancillary administrative preclearance proceedings. The appellate decision held that Petitioners were not entitled to such an award because the granting of the October 15, 1979, injunction, barring the implementation of the unprecleared 1975 districting plan, in effect terminated the litigation. The Court held that since the

administrative preclearance process occurred after the termination of the litigation, Petitioners could not be deemed prevailing parties in the voting rights action merely because they participated in an administrative process which was not connected to any ongoing litigation.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING THE PROPER INTERPRETATION OF THE VOTING RIGHTS ACT'S ATTORNEY'S FEE PROVISION CONSISTENT WITH THE CONGRESSIONAL POLICY OF ENCOURAGING PRIVATE ENFORCEMENT OF THE VOTING RIGHTS ACT

This case raises important questions of statutory construction, the proper interpretation of which is necessary to effectuate the congressional policy of

utilizing private enforcement of Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973 c, to eradicate the vestiges of voting discrimination. Since its enactment in 1965 and through subsequent extensions and reauthorizations, Congress has declared that Section 5 is the Act's primary tool to combat voting discrimination. Congress has also mandated vigorous enforcement of Section 5 in covered jurisdictions. Those covered jurisdictions are, Congress recognized, in the areas where the worst and most intractable practices of voting discrimination have historically occurred. Realizing that the resources of the United States Attorney General are limited, Congress has expressly permitted private parties to vindicate their rights under Section 5. Moreover, through the attorney's fees statute in the Voting

Rights Act, 42 U.S.C. Sec. 1973 l (e), Congress established an additional policy of assisting private parties to retain the services of legal counsel to secure their Section 5 rights.

The purpose of Section 5 is to prevent the adoption by covered jurisdictions election structures which have a discriminatory purpose or a discriminatory effect on minority voting strength, and to require that newly-adopted election plans be non-discriminatory. See generally, Allen v. Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). In an action to enforce Section 5, the issuance of a permanent injunction enjoining the continued implementation of a discriminatory districting plan provides only a partial remedy --the prohibition of a newly-enacted discriminatory scheme. A

complete remedy -- the adoption of a non-discriminatory election plan -- is only afforded when a new redistricting plan which complies with the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act is in place.

Federal courts in Section 5 enforcement actions, like this case, will enjoin the use of unprecleared election plans, but defer to Section 5 preclearance proceedings the task of approving a non-discriminatory plan. Securing a complete remedy will, therefore, often require voting rights litigants to participate in the Section 5 preclearance process. Section 5 requires approval of the proposed change affecting voting by either the United States District Court for the District of Columbia or the United States Attorney General. Most political

subdivisions utilize the administrative proceedings before the Attorney General. Thus, private parties in the context of an ongoing Section 5 lawsuit must ordinarily appear before the Attorney General in order to secure their complete remedy as provided by Section 5. Because of the complex and often adversarial nature of these administrative proceedings, minority voters need legal counsel to assist the Attorney General in arriving at a proper evaluation of the facts, to apply the substantive legal standards, and to prepare the written comments. Through the attorney's fees statutes, private parties are enabled to secure legal counsel to participate in these administrative proceedings during the remedy phase of a Section 5 enforcement action.

The Court of Appeals' decision denied compensation for services rendered in the

administrative proceedings before the Attorney General. By denying such fees, the Court of Appeals' decision discourages the participation of private attorneys who would otherwise undertake to represent minority voters in Voting Rights Act cases in Section 5 covered jurisdictions. Without legal counsel, such citizens cannot further the important Congressional policy of vigorously enforcing Section 5. For these reasons, the Court of Appeals' decision undermines important Congressional policies which underlie the fee provisions of the Voting Rights Act. The proper construction of that provision to comport with those policies presents an important question warranting review by this Court.

A. EXPLICIT CONGRESSIONAL POLICY FAVORS VIGOROUS PRIVATE ENFORCEMENT OF SECTION 5.

Congress has repeatedly recognized the central role of Section 5 in eliminating voting discrimination since the adoption of Voting Rights Act in 1965. As recently noted by this Court:

> "Congress has amended the Voting Rights Act several times, each time continuing the basic structure of the original preclearance provision. In the legislative history of the extensions of the Act, [Sec.]5 has been deemed to be a 'vital element' of the Act to ensure that new subterfuges will be promptly discovered and enjoined. H.Rep. No. 397, 91st Congress, 1st Session, 8 (July 28, 1969)." (footnote omitted)

McCain, supra, 465 U.S. at 248, 104 S.Ct. at 1045, 79 L.Ed.2d at 281 (1984). During its consideration of the 1982 Voting Rights Act extension, Congress acknowledged the continuing need for Section 5 coverage:

> "Although we have come a long way since 1965, the nation's task in securing voting rights is not finished. Continued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial safeguards now.
>
> The Committee [Senate Committee on the Judiciary] is equally concerned about the risk of losing what progress has already been won. The gains are fragile. Without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." (footnote omitted)

S.Rep. No. 97-417, 97th Cong., 2d Sess., 10 (May 25, 1986).[7]

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7 The Senate Report repeatedly documented the instances where Section 5 objections prevented the implementation of discriminatory election changes. Senate Report, supra, at 12. In the State of Texas, from the time period of 1975-1981, there were at least 85 letters of objections. Hearings on the Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional

The purpose of Section 5 is very straightforward:

> "This provision was designed to insure that the old devices for disenfranchisement would not simply be replaced by new ones. Through this remedy Congress intended to provide an expeditious and effective review to insure that devices other than those directly addressed in the Act (literacy tests and the poll tax) would not be used to thwart the will of Congress to secure the franchise for blacks."8

S.Rep. No. 97-417, supra, at 6. As

Rights of the House Committee on the Judiciary, 97th Cong., 1st. Sess., pt.2 at 960 (1981) (hereinafter cited as House Hearings). From the time period of 1965 to early 1982, there were 695 letters of objection issued by the Atttorney General to covered jurisdictions. Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 (Bills to Amend the Voting Rights Act of 1965) before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1718 (1982) (hereinafter cited as Senate Hearings).

8 The Section 5 provision also protects language minority groups such as persons of Spanish heritage. 42 U.S.C. Sec. 1973 1 (c) (3).

indicated by the legislative history, the ultimate objective of Section 5 is to secure in place a non-discriminatory election structure, not merely to permanently enjoin a discriminatory change in the law affecting voting.

Congress and this Court also recognized that the resources of the Attorney General to enforce the Section 5 provisions were limited.[9] In view of the extensive non-compliance with Section

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9 A former Assistant Attorney General for the Civil Rights Division in testimony before House Subcommittee on Civil and Constitutional Rights to consider extension of the Voting Rights Act noted the difficulty of reviewing all of the submitted election changes. Testimony of Drew Days, House Hearings, supra, pt. 3 at 2117. See also, id., pt. 2 at 960 - 992 (testimony documented instances where private enforcement of letters of objection were necessary because the Department of Justice did not institute any litigation).

5,[10] the Attorney General needs the resources of private citizens functioning in the capacities of private Attorneys General to vigorously enforce Section 5. As this Court noted:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to

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[10] S.Rep. No. 97-417, supra, at 12-14. The Senate Judiciary Committee referred to instances where the covered jurisdiction did not submit election changes for approval and to instances where the covered jurisdiction ignored the letter of objection issued by the Attorney General, as in the present case.

> allow the individual citizen standing to insure that his city or county government complies with the [Sec.] 5 approval requirements." (footnotes omitted)

Allen, supra, 393 U.S. at 556-57, 89 S.Ct. at 827, 22 L.Ed.2d at 11-12. Thus, private enforcement plays an important role in furthering the Congressional policy of vigorously enforcing Section 5.

Congress enacted the attorney's fees provision of the Voting Rights Act, 42 U.S.C. Sec. 1973 l (e), to make it possible for private parties to retain legal counsel for proceedings to enforce voting rights. Without such counsel, private parties would not have the resources or expertise to vigorously enforce Section 5. In enacting the fee statute, Congress specifically noted: "All of these acts [including the Voting Rights Act] depend heavily upon private

enforcement, and fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies." S.Rep. No. 97-417, supra, at 42.[11]

B. MINORITY VOTERS' ABILITY TO SECURE A COMPLETE SECTION 5 REMEDY REQUIRES THEM TO OBTAIN REPRESENTATION IN THE SECTION 5 REVIEW PROCESS.

Contrary to the view expressed by the Court of Appeals decision, a successful voting rights lawsuit in a Section 5 covered jurisdiction does not terminate when the District Court issues a permanent

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[11] Congress' concern regarding the importance of private attorney involvement in the enforcement of the civil rights statutes resulted in the enactment of The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Sec. 1988, which also provides a basis for fee awards in voting rights actions.

injunction against the challenged districting plan. The District Court continues to exercise jurisdiction to monitor the important remedy phase of the lawsuit and to assure compliance with the purpose of Section 5 - the adoption of a non-discriminatory redistricting plan. However, that remedy phase does not take place before the District Court which enjoined the prior plan.

The remedy phase is the heart of a Section 5 enforcement action. The liability phase of such a lawsuit involves very straightforward determinations of whether the political subdivision is a covered jurisdiction, whether the change in the law affecting voting must be precleared, and whether the change occurred within the applicable statutory period. City of Lockhart, 460 U.S. 125, 129, n.3, 103 S.Ct. 1000, 1001, n.3, 74

L.Ed.2d 863, 869, n. 3 (1983). During the remedy phase, the final redistricting plan will be routinely adopted by the District Court after Section 5 approval has been secured from the Attorney General. The critical substantive determinations are those made in the administrative preclearance proceedings. Therefore, to secure a complete remedy in Section 5 litigation, private parties need the services of attorneys at both the liability and remedy stages of a Section 5 enforcement action. Minority voters will need legal counsel for the administrative proceedings to assure that the final remedy complies with the applicable constitutional and Section 5 standards.

The Court of Appeals' decision, holding that the litigation terminated prior to the Section 5 proceedings and that such proceedings were wholly distinct

from Petitioners' action, severely erodes the ability of minority citizens to obtain representation in critical Section 5 preclearance proceedings. That decision mischaracterizes Section 5 litigation, misconstrues the Voting Rights Act's fee provision, and subverts the important Congressional policies summarized above.

1. Federal Courts in Section 5 Enforcement Actions Have Continuing Jurisdiction to Provide Aggrieved Minority Voters Complete Section 5 Relief.

The Supreme Court has consistently recognized the continuing jurisdiction of a District Court during the remedy phase of a voting rights lawsuit to secure compliance with Section 5. In McDaniel, supra, this Court held that whenever a

covered jurisdiction submits a redistricting plan reflecting the policy choices of the governing body to replace a districting plan found to be unconstitutional, such a new plan must be submitted for Section 5 approval. In arriving at this holding, the Court reviewed the legislative history of the Voting Rights Act which clearly referred to the continuing jurisdiction of the District Court. McDaniel, supra, 452 U.S. at 148-49, 101 S.Ct. at 2235-36, 68 L.Ed.2d at 738-739. See also, 452 U.S. at 150, note 30, 101 S.Ct. at 2236, note 30, 68 L.Ed.2d at 740, note 30 (if the legislative body fails to replace an unconstitutional redistricting plan, then the court must impose a court-ordered remedy).

The Court in McDaniel simply reaffirmed well established principles

articulated in Wise v. Lipscomb, 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). In Wise, the Court recognized that at the remedial stage of a redistricting lawsuit, the task of submitting a new plan must fall upon the legislative body. If the legislative body does not respond or there are other exigencies, then "... it becomes the 'unwelcome obligation,'... of the federal court to devise and impose a reapportionment plan pending later legislative action." Wise, supra, 437 U.S. at 540, 98 S.Ct. at 2497, 57 L.Ed.2d at 417. With respect to Section 5 covered jurisdictions, the Court stated:

> "Furthermore, the distinctive impact of [Sec.] 5 of the Voting Rights Act ... upon the power of the States to reapportion themselves must be observed. ... A new reapportionment plan enacted by a State, including one purportedly adopted in response to

> invalidation of the prior plan by a federal court, will not be considered 'effective as law,'... until it has been submitted and has received clearance under [Sec.] 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans."

Wise, supra, 437 U.S. at 541-42, 98 S.Ct. at 2498, 57 L.Ed.2d at 418. Accord, Connor v. Waller, 421 U.S. 656, 95 S.Ct.2003, 44 L.Ed.2d 486, 487-488 (1975); Perkins v. Matthews, 400 U.S. 379, 396-397, 91 S.Ct. 431, 441, 27 L.Ed.2d 476, 489-490 (1971). See also Berry v. Doles, 438 U.S. 190, 192-193, 98 S.Ct. 2692,

2694, 57 L.Ed.2d 693, 696 (1978).

The Court of Appeals for the Fifth Circuit has also recognized the continuing jurisdiction of the District Court in a Section 5 covered jurisdiction. In Ramos v. Koebig, 638 F.2d 838, 843-845 (5th Cir. 1981), the Court of Appeals expressly adopted this approach of deferring to the Section 5 administrative process. Accord, Trinidad v. Koebig, 638 F.2d 846, 847-48 (5th Cir. 1981); Calderon v. McGee, 589 F.2d 909, 910-911 (5th Cir. 1979).

Thus, this Court and the Fifth Circuit have both acknowledged that when, after finding a covered jurisdiction's existing plan unlawful, a District Court defers to the preclearance review of a legislatively adopted replacement plan, it is merely giving the Congressionally-preferred process an opportunity to provide the judicially required remedy.

In view of this Supreme Court and appellate precedent, the District Court has an obligation to exercise continuing jurisdiction to assure that the plan ultimately implemented provides complete Section 5 relief. Without this continuing jurisdiction, the District Court would be powerless to prevent the implementation of a new redistricting plan which was unconstitutional or in violation of Section 5. The District Court in this case did not fail to maintain its jurisdiction, but denied fees for Petitioners' litigation-related representation during the period of retained jurisdiction.

The Court of Appeals' ruling in this case that the litigation ended with the issuance of the injunction enjoining the implementation of the unprecleared 1975 redistricting plan is inconsistent with

the policy underlying the obligation to maintain continuing jurisdiction until a remedy is provided. It is also inconsistent with what happened in this case. In reality, the District Court did not terminate the litigation. The District Court did not enter any judgement until April 19, 1984. The entry of judgment came long after the eventual approval by the Attorney General of the third districting plan submitted for Section 5 review. The District Court was obliged to exercise continuing jurisdiction to assure that Jim Wells County did not conduct any elections for county commissioners using an unprecleared plan, as it had in 1976 and 1978, and did not refuse to hold any elections, as it had in 1980. As previously mentioned, the 1975 plan, the pre-existing court-ordered plan, and a prior plan had either been

declared unconstitutional or found to be in violation of the Voting Rights Act. Thus, the District Court had to exercise continuing jurisdiction to assure that the electoral process, which had been disrupted by Jim Wells County's failure and refusal to comply with Section 5, would be resumed using an election plan which did not violate the United States Constitution or the Voting Rights Act. Under these circumstances, the Court of Appeals' ruling that the litigation terminated before the remedy stage is contrary to the scheme of Section 5 enforcement as well as the reality of this case.

2. Representation in Section 5 Administrative Proceedings Is Necessary To Secure Complete Section 5 Relief.

Most of the covered jurisdictions submit their proposed changes in the law affecting voting to the Attorney General for Section 5 preclearance as an alternative to a three-judge action in the District Court for the District of Columbia.[12] Although the proceeding before the Attorney General may, as in this case, arise as a result of Section 5

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[12] In testimony before Congress during the 1982 extension of the Voting Rights Act, an official from the Attorney General's office noted:

> "As noted above, the form of preclearance used most often is submission of a proposed change to the Attorney General. The number of submissions is now huge. For example, during 1980, some 7,300 changes were submitted; more than 4,000 were from Texas. For 1981, through September 30, 5,039 changes were submitted. There has been little use of the alternative of judicial preclearance." (footnotes omitted)

Senate Hearings, supra, at 1717.

litigation, the proceeding is not a judicial one; nevertheless, the same judicial standards under Section 5 apply, as they would in a three-judge court preclearance action:

> "Indeed, irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters ... and federal officials are confronted with the same 'difficult substantive issue.' " (citations omitted)

McCain, supra, 465 U.S. at 247, 104 S.Ct. at 1044, 79 L.Ed.2d at 280 (1984).

In administrative preclearance actions, the Attorney General is less able to give ample consideration to possible evasions of minority voting rights. Although the same "difficult substantive

issues" are present in either type of preclearance proceeding, in an administrative submission the Attorney General does not have the benefit of an extensive discovery schedule as permitted in a judicial Section 5 preclearance proceeding. Moreover, the statute sets a limit of 60 days for the Attorney General to evaluate a completed submission of an election change. In addition, the Attorney General does not have the staff or resources to conduct an extensive review of the thousands of election changes submitted annually. For these reasons, the Attorney General relies heavily and properly upon affected private parties and their attorneys to provide information on proposed election changes in covered jurisdictions.

The involvement by private parties in Section 5 enforcement actions in the

administrative preclearance proceeding is extensive.[13] The information provided in the written comments to the Attorney

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[13] As previously stated, the forwarding of written comments is permitted by 28 C.F.R. Sec. 51.27 (a). See also, United States Commission on Civil Rights, A Citizen's Guide to Understanding the Voting Rights Act, at 8-9 (Clearinghouse Publication 84) (October 1984):

> "The final decision on a submission will be based on the requirements of the act, court decisions, and departmental policy; but evidence to support the decision will be based on information received from the submitting jurisdiction, from interested parties, and from the Department of Justice's own investigations. Detailed comments are always useful in reviewing proposed voting changes. ... If all relevant information is not available, however, individuals still should write or call the Assistant Attorney General and provide whatever information they have."

General is often the product of interviews, community meetings, and attendance at public hearings. Private parties must rely upon legal counsel to gather the facts, apply the substantive legal standards, and prepare a written comment urging disapproval of a proposed election change. In many instances the Attorney General, relies upon these written comments and other input to issue a letter of objection.[14] Where the administrative preclearance process arises out of Section 5 litigation --

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14 As noted in the testimony on the extension of the Voting Rights Act in 1981, the Attorney General would seek out individuals who could provide assistance in the Section 5 review process, "One of the things that ... [the Department of Justice] required of every submitting jurisdiction in the submission itself was information about local minority organizations or persons who would be in a position to provide us with their perspective on the proposed change." House Hearings, supra, pt. 3 at 2141.

particularly where the jurisdiction, judicially compelled to preclear a remedial election plan, elects to do so by a submission to the Attorney General -- such private parties' attorneys' involvement is an integral part of their representation of such parties in their legal action.

This case presents a good illustration of such involvement and reliance by the Attorney General on the written comments of private litigants' attorneys in issuing the letters of objections. During the administrative proceedings, the Petitioners submitted written comments by counsel urging the rejection of the 1979 and 1980 redistricting plans for the Jim Wells County Commissioners' Precincts. In the letter of objection for the 1979 plan, the Attorney General cited three of the four

reasons listed in Petitioners' written comment. In the letter of objection for the 1980 plan, the Attorney General cited all three reasons listed in Petitioners' written comment.[15]

During this administrative process, the Petitioners and their counsel engaged in very extensive negotiations with the county officials. The purpose of these negotiations was to secure a redistricting plan which had three Commissioners' Precincts each having a 65% Mexican American population. To advance this objective, Petitioners were involved in presentations before the Commissioners' Court, in discussions with individual Commissioners, and in meetings with community representatives.
Petitioners accomplished this objective

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15 See footnote 4, infra.

with the County's adoption of the 1981 redistricting plan. The accomplishment of this objective was due to the letters of objection issued by the Attorney General and the extensive negotiations undertaken by Petitioners. The adoption of the 1981 plan resulted in securing complete Section 5 relief.

Securing a complete Section 5 remedy would not have been possible without the active participation of Petitioners and their legal counsel. In attaining that remedy, Petitioners and their counsel furthered the explicit Congressional policy of vigorously enforcing Section 5 by vindicating their rights against a recalcitrant political subdivision which ignored an initial letter of objection and subsequently adopted two discriminatory redistricting plans which also resulted in two additional letters of objection.

Congress intended that in these circumstances, where the Section 5 proceeding was a necessary completion to the goal of an ongoing lawsuit, parties such as Petitioners should be awarded attorney's fees for work performed during the Section 5 administrative proceeding. The award of attorney's fees in such cases will enable minority citizens to obtain legal counsel to represent them not only during the liability stage when a discriminatory election change is permanently enjoined, but also to represent them during the administrative process which constitutes the critical remedy phase of most Section 5 enforcement actions. In order to effectuate the purposes of Section 5, the attorney's fee provision of the Voting Rights Act must be construed to permit a fee award in such cases.

3. The Court of Appeals' Decision Misconstrues the Voting Rights Act and Subverts Its Policies.

The Court of Appeals denied an award of attorney's fees for Petitioners' extensive administrative advocacy. In this case, Petitioners devoted a substantial amount of time to proceedings before the Attorney General, which constituted the remedy stage of the litigation. As previously noted, the District Court disallowed 58.2 attorney hours and 378.9 paralegal hours. (R.Vol. 1, pp. 42-45) Such a disallowance frustrates the Congressional purpose of making available legal counsel to private parties to vindicate their rights under Section 5. The disallowance of these hours from an award of attorney, fees will discourage private enforcement of Section

5. Private attorneys are well aware that these types of cases involve significant administrative advocacy before the Attorney General. Without the potential compensation for such an expenditure of time, private attorneys will simply not undertake to institute Section 5 enforcement proceedings or will not pursue them at the critical remedy phase. The ultimate result will be the absence of vigorous private enforcement actions, contrary to explicit Congressional policy.

Moreover, the denial of an award of attorney's fees for services rendered during the remedy phase of a voting rights lawsuit creates a distinction for purposes of an award of attorney's fees between those voting rights cases filed in Section 5 covered jurisdictions and those cases filed in other jurisdictions. In a jurisdiction not covered by the special

Section 5 preclearance provisions, private attorneys participate in court proceedings at the remedy stage of the lawsuit, seeking a replacement for the discriminatory election scheme. Since the services rendered in cases in such other jurisdictions are in the context of court litigation, those other litigants would be entitled to fees. However, in a Section 5 covered jurisdiction, the parties in a similar lawsuit would not be entitled to any compensation for attorney's work performed before the Attorney General in administrative proceedings mandated by the Voting Rights Act. Such a difference in treatment is not permitted by the Congressional policy of making available legal counsel to private parties to vigorously enforce the Section 5 protections. Minority citizens in covered jurisdictions were intended to have more,

not less, access to effective means of enforcing their voting rights. Yet, the Court of Appeals' decision puts minority citizens in covered jurisdictions at a disadvantage by arbitrarily concluding that the litigation terminated before the remedy stage commenced.

The Court of Appeals' decision creates another anomalous distinction between Section 5 declaratory judgment actions and administrative proceedings before the Attorney General. If the political subdivision had decided at the remedy stage of a Section 5 enforcement action to seek judicial preclearance before the United States District Court for the District of Columbia and Petitioners had secured the rejection of the 1979 and the 1980 redistricting plans by that court, there would be no question of Petitioners' entitlement to an award of

attorney's fees.[16] However, since the remedy phase consisted of administrative proceedings before the Attorney General, the Court of Appeals' decision would not permit an award of attorney's fees.

This distinction created by the Court of Appeals would permit covered jurisdictions to evade their Section 5 responsibilities. Covered jurisdictions would pursue the administrative preclearance with the full understanding that the unavailability of attorney's fees to private attorneys would leave most affected minority citizens without representation. Consequently, without the participation of the affected parties and their legal counsel, the type of vigorous enforcement envisioned by Congress in such

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[16] See, e.g., Com'rs Court of Medina Cty., Tex. v. United States, 683 F.2d 435 (D.C. Cir. 1982).

proceedings would be diminished or eliminated. The Attorney General would not have access to the type of information necessary to evaluate the proposed election change -- in particular, information from an affected party concerning the potential discriminatory effects of proposed election changes.

The chilling effect of the Court of Appeals' ruling would extend far beyond the circumstances of this case. It is typical of Section 5 enforcement actions that no additional judicial proceedings occur after the court orders legislative adoption of the redistricting plan and submission of the proposed election change for Section 5 approval. Thus, the ruling would in effect prevent the award of attorney's fees in the remedy phase of most Section 5 cases where the covered jurisdiction decides to pursue

administrative preclearance in the remedy phase of the lawsuit. Considering that there are approximately 909 political subdivisions subject to the Section 5 preclearance provisions,[17] -- many of which will have to adopt redistricting plans after the 1990 census -- the Court of Appeals' decision will have a substantial impact on the private enforcement of the Voting Rights Act.

In the case at bar, there was still no remedy after the issuance of the permanent injunction against the 1975 redistricting plan. Although there was no further judicial action, there was extensive administrative advocacy and negotiations with the County. These efforts finally resulted in a remedy meeting Section 5 standards as well as

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[17] 50 Fed.Reg. p. 19122 (May 6, 1985).

meeting the Petitioners' goal of creating three Commissioners' Precincts each containing a 65% Mexican American population. To deny an award of attorney's fees for Petitioners' work during the administrative preclearance proceedings would clearly frustrate the explicit Congressional policy of encouraging private enforcement of the Section 5 voting rights protections.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH RECENT SUPREME COURT PRECEDENT

The Court of Appeals' decision is contrary to principles articulated in the recent Supreme Court decision in Webb v. Board of Education of Dyer County, ___ U.S. ___, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985), awarding attorney's fees for services rendered in an ancillary

administrative proceeding. The Court of Appeals circumvents this precedent by simply declaring that the litigation terminated prior to the remedy stage of the litigation. Such a holding is erroneous and raises an important question concerning the different treatment accorded to Section 5 administrative proceedings involving the Attorney General as compared to other administrative proceedings where attorney's fees have been awarded.

Webb involved a claim for attorney's fees for time expended on an optional administrative proceeding occurring years before litigation commenced. In affirming the denial of fees, the Supreme Court held that a prevailing party could recover fees in an ancillary administrative proceeding if the services rendered were both useful and of a type ordinarily necessary for the

successful advancement of the civil rights litigation. The Court referred to Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983), which held that compensation should be provided only for those hours which are reasonably expended on the litigation.

As observed by the Court of Appeals, the Webb holding applies to the administrative preclearance process of Section 5 (Pet.App. at 20a - 22a). However, the court below denied fees, although the Webb criteria were met here, simply because the court erroneously determined that the litigation had terminated with the issuance of the October 15, 1979, injunction against the continued implementation of the 1975 districting plan.

The Court of Appeals' holding

vitiates the principles established in Webb, by foreclosing any attempt by Petitioners to demonstrate that their administrative work was useful and of the type ordinarily necessary for the successful advancement of their civil rights litigation. Under the rule of this case below, voting rights litigants in most Section 5 enforcement actions will be precluded from advancing to the first threshold determination under Webb by the semantic expedient of declaring that in such cases there is no longer any ongoing litigation.

Moreover, according to the Court of Appeals' holding, plaintiffs would not be able to demonstrate that they were the catalysts causing the political subdivision to adopt a plan which is the product of a successful negotiation. Such a ruling is contrary to explicit Supreme

Court precedent and Congressional legislative history, recognizing that formal judicial relief is not required as a prerequisite to an award of attorneys fees. Hensley, supra, 461 U.S. at 435, 103 S.Ct. at 1940, 76 L.Ed.2d at 52.

By denying an award of attorney's fees for successful administrative advocacy before the Attorney General in a Section 5 enforcement action, the Court of Appeals decision disregards the substantive standards articulated by this Court in Webb and Hensley. Both of these cases permit the recovery of attorneys fees for hours reasonably expended on the successful outcome of the lawsuit. The fact that work may have occurred outside the confines of the courtroom is not dispositive. Webb specifically permits the recovery of fees for work expended in ancillary administrative proceedings if

the work is related to the ongoing litigation. The key inquiry is whether the ancillary administrative proceedings will dispose of issues raised by the pleadings in the complaint. In such cases, services rendered in these administrative proceedings, whether they are rendered at the liability or remedy stages of the litigation, are considered to be services reasonably expended on the litigation. One cannot simply circumvent the Webb holding by declaring that the litigation has terminated, particularly since it is only at that stage that the Voting Rights Act action commences.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 84-2421

ALFREDO R. ARRIOLA, et al.,
Plaintiffs-Appellants,

v.

T. L. HARVILLE, et al.,
Defendants-Apellees.

Appeal from the United States
District Court for the
Southern District of Texas
(Civil Action No. C-78-87)

Argued September 3, 1985

Decided January 31, 1986

Joaquin G. Avila, Judith A. Sanders-Castro, Jose Garza, Jose Roberto Juarez, Jr., Morris J. Baller, Mexican American Legal Defense and Educational Fund for Plaintiffs-Appellants.

J. G. Adami and Perkins, Oden, Warburton, McNeil and Adami, for Defendants-Appellees.

Irving Gornstein, Jessica Dunsay Silver, Civil Rights Division, Department of Justice, for United States of America, amicus.

Before GOLDBERG, JOLLY and HIGGINBOTHAM, Circuit Judges.

Opinion for the Court filed by Circuit Judge GOLDBERG.

E. GRADY JOLLY, Circuit Judge:

We hold today that attorney's fees may not be awarded to prevailing plaintiffs under the Voting Rights Act for services rendered in preclearance submissions to the Attorney General under Section 5 of the Voting Rights of 1965, as amended. [1] 42 U.S.C. §1973c. We therefore affirm the holding of the district court.

I

In 1974 Jim Wells County in south central Texas submitted a reapportionment plan for commissioner precincts to the district court, which approved the plan. The county, however, adopted a new plan in

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[1] As will be evident from our later discussion, this holding does not preclude compensation for services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and where that work is required and necessary to resolve the issues of the independent lawsuit.

1975, and the defendant Harville, a county judge, sent the Justice Department a letter informing them of the change. The Justice Department did not respond the Harville's letter. It apparently did not view the letter as an attempt to seek preclearance to the 1975 plan under the Voting Rights Act. Nevertheless, Jim Wells County conducted elections from 1975 to 1979 in accordance with the unprecleared 1975 plan.

The County did submit the plan for preclearance review in 1977. The plaintiff Arriola and others, represented by the Mexican American Legal Defense Fund (MALDEF), submitted objections to the Justice Department. In 1978 the Justice Department rejected the proposed plan.

The plaintiffs then filed an action under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. They sought an injunction to prevent further elections under the

1975 plan and to order the county to develop a new plan. Despite the county's argument that the 1975 letter to the Justice Department was a submission to which the Department had failed to object, MALDEF succeeded in enjoining further use of the 1975 plan in October 1979. MALDEF, however, failed to prevent the 1978 elections.

Because of the injunction, Jim Wells County then submitted three plans in succession to the Justice Department for preclearance. After rejecting the first two plans, the Justice Department precleared the third. MALDEF objected to each and submitted alternative plans. In its first plan, MALDEF urged three districts, each with a Mexican-American population of sixty-five percent. It then submitted two more plans with similar Mexican-American percentages. In addition to submitting

proposed plans, MALDEF undertook other activities in connection with the pre-clearance process, primarily lobbying with county and federal officials.

The Justice Department cleared the final plan submitted by Jim Wells County. Compared to the county's first plan, this plan increased the number of commissioner precincts with Mexican-American population percentages of at least sixty-five percent from one to three. After this plan had been accepted, no further action was taken in the pending lawsuit except for matters connected to MALDEF's efforts to obtain attorney's fees and costs.

After the plan was accepted, MALDEF petitioned the district court for attorney's fees and costs. While granting fees incurred in obtaining the initial injunction, the district court denied all fees and costs for services rendered after

MALDEF obtained its injunction. In denying these fees, the district court followed the test laid out in Posada v. Lamb County, Texas, 716 F.2d 1066, 1075 (5th Cir. 1983), requiring that one claiming fees for services in the section 5 preclearance process show that his "participation, through particularly astute criticism or creative legal argument, changed the result that the Attorney General would otherwise have reached." MALDEF presented evidence to the court that compared their proposed plans and the plan finally accepted by the Justice Department, and argued that the Justice Department had apparently reacted to its objections. The Court found, however, that MALDEF had not not met the Posada standard because this evidence did not show that MALDEF had caused the Justice Department to reach a result different from one that they would otherwise have reached.

MALDEF appeals the district court's denial of fees incurred in the preclearance, the denial of all costs and the reduction of its hourly rate for travel.

II

MALDEF maintains that the district court abused its discretion when it denied fees for services rendered in the preclearance submission because the submission was part of the litigation to enforce section 5 of the Voting Rights Act. According to MALDEF, the suit for an injunction was not over because the district court retained jurisdiction and had a continuing obligation to secure compliance with the injunction. Furthermore, MALDEF argues that the objectives of the litigation had not all been achieved when the injunction was granted because the county did not yet have a plan that had at least three Mexican-American districts with population

percentages of sixty-five percent or greater. MALDEF characterizes the preclearance submission as the "remedy phase" of the injunction suit, and argues that the only effective relief Voting Rights Act plaintiffs will usually obtain comes through the preclearance submission process.

MALDEF further argues that a recent Supreme Court decision in a section 1988 case provides the standard for the award of attorney's fees for collateral administrative proceedings in Voting Rights Act cases. Webb v. Board of Education of Dyer County, __U.S.__, 105 S.Ct. 1923, 85 L.Ed. 2d 233 (1985). In Webb, the Supreme Court noted that the petitioner there had suggested "that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to

advance the civil rights litigation to the stage it reached before settlement." Id., 105 S.Ct. at 1929. MALDEF argues that the work it did in connection with the pre-clearance submission meets this standard as both useful and necessary to advance the voting rights litigation in this case.

Jim Wells County maintains that the district court correctly applied the Posada standard that controls the award of attorney's fees in this case. The County argues that MALDEF did not show the impact on the Justice Department's decision that that standard required. The county also argues that MALDEF could not recover attorney's fees for services rendered in preclearance submissions because they were not "prevailing parties" in an "action or proceeding" as section 14 of the Voting Rights Act, the attorney's fee provision,

requires. [2]

III

Today we decide an issue left open by Posada: whether attorney's fees may be awarded under section 14 of the Voting Rights Act, 42 U.S.C. §1973l(e), for services rendered in a preclearance submission to the Attorney General under section 5 of the Act. Posada 716 F.2d at 1074. In Posada, while pretermitting the ultimate question, we said that if fees were available at all, a petitioner must show

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[2] The United States as amicus curiae joined most of the county's arguments but also emphasized the harmful effect that implementation of Posada's standard would have on Justice Department operations. The United States asked us to abandon that part of Posada that suggested a standard for recovering attorney's fees that would examine the impact of petitioners on the Justice Department's decision because petitioners might seek to require Justice Department officials to testify concerning their decisional process.

that his participation in the preclearance process changed the result that the Attorney General would have reached, and that the change was accomplished through counsel's "particularly astute criticism or creative legal argument."

To decide this issue, we must first determine whether the preclearance submission is itself an "action or proceeding." If the submission is neither, we must decide whether the services rendered in the preclearance submission were compensable as part of another proceeding, that is the lawsuit seeking the injunction under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

IV

A.

The question whether a preclearance submission is an action or proceeding and thus whether attorney's fees can be awarded

in a section 5 preclearance submission depends on the intent of Congress when it created the preclearance submission and the attorney's fee provision.

The Voting Rights Act requires specified state and local governments to seek approval of any change from a previously approved election plan through a declaratory judgment action brought in the District of Columbia. The Act also provides a more expeditious way of obtaining federal approval of election changes: the state or local government may submit the proposed change to the Justice Department and have it precleared. If the Justice Department does not object to the change within sixty days, then the state or local government may implement the precleared change. Voting Rights Act § 5, 42 U.S.C. § 1973c. The plan to which the Justice Department fails to object may then

be implemented, and the Justice Department's decision not to object to the plan cannot be challenged in court. However, the plan itself can be challenged in a later action.

Congress also allowed successful plaintiffs in voting rights cases to recover attorney's fees. "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1973l (e) (emphasis added)

The wording of the statute requires us to determine whether a preclearance submission is an "action or proceeding." Congress' use of the term "action or proceeding" is important in discerning its intent, especially since Congress used

different terms for preclearance submissions and for actions or proceedings. For example, in the first part of section 5, 42 U.S.C. § 1973c, the terms "action" and "proceeding" are consistently used to refer to the lawsuits brought to prevent the implementation of an unconstitutional election change. In the latter part of section 5 that describes the preclearance process, the words "action" and "proceeding" do not appear, except to refer to lawsuits brought to prevent the implementation of the election change or to lawsuits brought to challenge an election change to which the Justice Department has failed to object. In other words, the drafters consistently avoided using the terms "action" or "proceeding" to describe the preclearance process. See Gerena-Valentin v. Koch, 739 F.2d 755, 760, n.2 (2d Cir. 1984)(excerpts from legislative

history of section 14).

The term that Congress employed for compensable activities, "action or proceeding," commonly refers to some sort of adversary proceeding in the nature of a traditional lawsuit. The preclearance process bears little resemblance to such an action or proceeding. There is no plaintiff nor defendant; no pleadings nor formal procedural rules; no judge nor jury; no requirement for a ruling nor judgment; no procedure to enforce or implement. Moreover, unlike the traditional lawsuit, a Justice Department decision not to object to an election change cannot be reviewed. Briscoe v. Bell, 432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed. 2d 439 (1977). The Justice Department has plenary authority over the preclearance submission, and it need not consider any of the objections or comments filed by third parties such as the

appellant. The preclearance submission and decision are executive rather than judicial in nature because the Justice Department need not consider the comments of those submitting them, and can base its decision entirely on its own independent investigation if it so wishes. All these factors indicate the nonjudicial character of the preclearance process and decision. The preclearance process was developed to enable state and local governments to avoid a judical decision in an "action or proceeding," and to give them a quick decision on their election changes. Morris v. Gressette, 432 U.S. 491, 503-504, 97 S.Ct. 2411, 2419-2420, 53 L.Ed. 2d 506. (1977).

The congressional intent to award attorney's fees for proceedings in the nature of traditional lawsuits also is illustrated by the fact that Congress used

the term "prevailing parties" to describe those persons who should be awarded attorney's fees. Third parties who, like appellant, submit comments to the Justice Department are not "prevailing parties" with respect to a preclearance submission, because they are not parties at all. Section 5 of the Voting Rights Act, the provision that establishes the violations on which a claim for attorney's fees is hinged, does not even mention persons who submit comments to the Justice Department. The only rights that third parties in the preclearance process have are those afforded by Justice Department regulations under section 5. 28 C.F.R. §§ 51.27-51.30. These regulations carefully label persons providing comments on a preclearance submission as "interested individuals and groups" who submit "communications." 28 C.F.R. §51.30.

These interested individuals and groups have none of the rights of parties. They cannot start a review, they cannot compel discovery, they have no right to be present when the submitting authority meets with the Attorney General, and they cannot obtain review of the Attorney General's decision.

We therefore conclude that Congress did not intend the term "action or proceeding" to include a preclearance submission, nor did it intend the term "prevailing parties" to include interested individuals and groups who submit comments to the Justice Department in preclearance submissions.

B.

Prior interpretations of section 14 of the Voting Rights Act and related statutes support the conclusion that Congress did not intend to award attorney's fees to participants in preclearance submissions.

The Second Circuit recently denied attorney's fees under the Voting Rights Act for lobbying activities that were not closely related to a lawsuit. Gerena-Valentin v. Koch, 739 F.2d 755 (2d Cir. 1984). The Gerena-Valentin court carefully separated the claim for fees into those claimed in connection with the lawsuit and those claimed for activities solely connected to the preclearance process. The court concluded that neither the language nor the legislative history of the attorney's fee provision showed a congressional intent to award attorney's fees for activities solely connected to the preclearance process. Id. at 760-61.[3]

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[3] The appellants cite a line of cases that have awarded attorney's fees under the Voting Rights Act or section 1988 for administrative proceedings. In the light
(Footnote Continued)

The Supreme Court has recently determined that attorney's fees could not be awarded

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(Footnote Continued)
of Webb, an analogy to these cases is now fatally flawed because they rely, directly or indirectly, on Title VII, which requires that claimants exhaust available administrative proceedings before they can bring their federal suit. Stathos v. Bowden, 728 F.2d 15, 22 (1st Cir. 1984) (relying on Chapliwy and Bartholomew); Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) (relying on Carey); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982) (Title VII); and Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982 relying on Carey); Brown v. Bathke, 588 F.2d 634, 638 (8th Cir. 1978)(cites Title VII cases). Many of these cases rely on Title VII indirectly through New York Gaslight Club v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed. 2d 723 (1980.

Webb v. Board of Education of Dyer County, which involved a claim that, like the Voting Rights Act, does not require exhaustion of administrative remedies, distinguished Title VII cases on that basis, and explicitly held that the reasoning in those cases did not apply to the context of 42 U.S.C. § 1988, and that "therefore the reasoning in Carey is not applicable to this case." Gerena-Valentin, 739 F.2d at 761. Webb, 105 S.Ct. at 1927.

under 42 U.S.C. § 1988, the wording of which is almost identical to the statute relevant here, for a state administrative process completed before litigation under the Civil Rights Act, 42 U.S.C. § 1983. Webb v. Board of Education of Dyer County, ___U.S.___, 105 S.Ct. 1923, 85 L.Ed. 2d 233 (1985). The Court said, "The time that is compensable under section 1988 is that 'reasonably expended on the litigation.'" Id., 105 S.Ct. at 1928 (quoting Hensley v. Eckerhart, 461 U. S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) (emphasis added in Webb).

> When the attorney's fee is allowed "as part of the costs"-to use the language of the statute-it is difficult to treat time spent used before the complaint was filed as having been "expended on the litigation" or to be fairly comprehended as "part of the cost" of the civil rights action.

Id. Since the attorney's fees provisions of

section 1988 and the Voting Rights Act are interpreted together, this reasoning should also be applied to time spent after the litigation has been completed under the Voting Rights Act. See Donnell v. United States, 682 F.2d 240, 245 n.7 (D.C. Cir. 1982); Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980); Connor v. Winter, 519 F.Supp. 1337, 1339 (S. D. Miss. 1981)(three-judge court).

C.

We must therefore turn to consider whether MALDEF's litigation terminated when it obtained an injunction against further use of the 1975 plan or whether the pre-clearance submission was a continuation of that litigation. There can be no question in this case that the litigation, as such, effectively terminated after the injunction. The record indicates that all docket entries in the case after the injunction

relate to the seeking of attorney's fees. Furthermore, although, as MALDEF points out, the district court retained jurisdiction that jurisdiction was to insure compliance with the injunction, not to provide any further remedy. Compare Trinidad v. Koebig, 638 F.2d 846 (5th Cir. 1981) (district court may order further relief if local government refuses to seek or cannot obtain preclearance).

MALDEF contends that the preclearance submission was the "remedy phase" of the injunction proceeding. This artfully chosen language attempts to portray an image of a plaintiff who has proved his case on the merits and who then automatically proceeds to the next step, in the same litigation involving the same parties, of proving the relief to which he is entitled. This image of the preclearance submission is hardly an accurate portrayal.

First, the preclearance submission is separate from the lawsuit. The participants are not the same. The preclearance process is in a different forum. It follows different law. In fact as we discussed above, it is not a judicial proceeding at all. There need be no connection between the lawsuit and the preclearance submission. Second, the "remedy phase" language is an inaccurate description because it suggests that the participant in a preclearance submission is a party. As we noted above, the preclearance submission is entrusted to the Attorney General, who invites comments to aid him in discharging his responsbility. Many persons submit comments who were not involved at all in lawsuits that may have preceded the preclearance submission. In the preclearance process the Attorney General accords no special privileges to

those persons who brought the lawsuit. It is therefore inaccurate to view the Justice Department's decision as the remedy phase of the separate and distinct injunction proceeding.

In this case, the litigation ended after the injunction, and therefore the services rendered in the preclearance could not have been useful or required for the litigation. Without such a connection between the preclearance submission and the lawsuit, section 14 does not allow attorney's fees.

V

The district court in this case, however, erred in its determination of the hourly rate. The district court used the hourly rate of the defense counsel as the lodestar for the fee award to the plaintiffs' counsel, but then the district court appears to have mistakenly used an hourly rate different from that charged by

the defense counsel for travel time. The court said, "plaintiff's success in this case entitles it to the hourly rate charged by one of the defendant's attorneys, Kenneth Oden, an attorney of excellent reputation who has practiced in Jim Wells County for many years, which is $70 an hour for all hours." (Emphasis added.) The result was that the "lodestar" defense counsel received $70 an hour for travel hours, and the appellants' attorney received only $20 an hour for travel hours. This was an abuse, perhaps unintentionally, of the district court's discretion. See Wheeler v. Mental Health and Retardation Authority, 752 F.2d 1063, 1073 (5th Cir. 1985); Carpenters Health and Welfare Fund v. Ken R. Ambrose, Inc., 727 F.2d 279 (3d Cir. 1983).

The district court did not abuse its discretion, however, when it denied the

plaintiff costs. MALDEF failed to submit evidence on costs at the hearing, and its tardy submission did not separate costs into those incurred before and those incurred after the injunction was granted.

The district court's judgment is affirmed as to the denial of attorney's fees for hours spent in connection with the preclearance proceeding and for all costs, and reversed as to the rate set for hours devoted to travel. The district court should allow $70 an hour for travel hours proved by plaintiffs.

AFFIRMED IN PART, REVERSED IN PART.

GOLDBERG, Circuit Judge, dissenting:

I do not read the attorney's fees provisions of the Voting Rights Act, their legislative history, or the cases interpreting them as narrowly as the majority does. In particular, I do not agree that

compensable pre-clearance activity under the Act is limited to "services... that [are] required and necessary to resolve the issues of [an] independent lawsuit." Supra at 507 n. 1.

Participation in pre-clearance reviews may contribute to the advancement of litigation that indisputably gives rise to fee awards. The question is whether, because of its relation to prior litigation, the pre-clearance review in this case is an "action or proceeding" within the meaning of the Act, and whether appellant may be considered the "prevailing party."

The government relies heavily on Gerena-Valentin v. Koch, 739 F.2d 755 (2d Cir. 1984), in urging us to hold that pre-clearance reviews are never actions or proceedings and can therefore never give rise to fee awards. But in Gerena-Valentin the court stated merely that "the

legislative history... contains no suggestion that awards of attorney's fees can be made for work solely in connection with preclearance reviews." Id. at 760 (emphasis added). [1] The court went on to note that "where the initiation of litigation is necessary to compel defendants to obtain preclearance before holding an election, lobbying efforts in a preclearance review might bring the litigation to a quick and successful end, a goal consistent with the statutory purpose..." Id. at 759. The Supreme Court has recently acknowledged that such activity may be compensable if it is "both useful and of a type ordinarily necessary

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[1] See also id. at 760 n.2 (Congress did not contemplate fee awards for work done in administrative proceedings "unrelated to successful litigation") (emphasis added).

to advance the civil rights litigation." Webb v. Dyer County Board of Education, ___U.S.___, 105 S.Ct. 1923, 1929, 85 L.Ed. 2d 233 (1985).

This Court has also recognized the importance of informal, administrative advocacy in advancing the ends of litigation under the Voting Rights Act. In Posada v. Lamb County, Texas, 716 F.2d 1066, 1071 (5th Cir. 1983), we confirmed that "A 'prevailing party' is one whose 'ends are accomplished as the result of the litigation even without formal judicial recognition'" (citing three 5th Circuit cases and one Supreme Court case). [2] In

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[2] Cf. S. Rep. No. 295, 94th Cong., 1st Sess. 41 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 774, 808 ("for purposes of the award of counsel fees, parties, may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief").

the present case, moreover, the prevailing plaintiffs did have formal judicial recognition of their activities in the pre-clearance review process. As the majority concedes,

> The plaintiffs ... filed an action under section 5 of the Voting Rights Act, 42 U.S.C. §1973c. They sought an injunction to prevent further elections under the 1975 plan and to order the county to develop a new plan .... MALDEF succeeded in enjoining further use of the 1975 plan in October 1979 .... Because of the injunction, Jim Wells County then submitted three plans in succession to the Justice Department for preclearance .... In addition to submitting proposed plans, MALDEF undertook other activities in connection with the preclearance process, primarily lobbying with county and federal officials.... According to MALDEF, the suit for an injunction was not over because the district court retained jurisdiction and had a continuing obligation to secure compliance with the injunction.... [A]s MALDEF points out, the district court retained jurisdiction...to insure compliance with the injunction...

Supra at 507, 508.

In order to recover attorney's fees under the Voting Rights Act the prevailing party must show

"a causal connection between the filing of the suit and the defendant's action." Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982) (emphasis added). In Posada we provided the following gloss on the requisite causal connection:

> Causal connection is established by evidence that the plaintiffs' lawsuit was a "substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior" .... The plaintiffs do not have to prove that their efforts were the sole reason for the defendant's rectifying actions. Some award is due so long as the plaintiffs' actions made an important contribution to the improvements achieved.

Posada, 716 F.2d at 1072 (citing three 5th Circuit cases and one Supreme Court case) (emphasis added).

In sharp contradistinction to the authorities cited above, the district court in this case declined to award attorney's fees because "there is no convincing tie-in between Plaintiffs' complaints expressed in

their comments to the Attorney General and his results." Order Awarding Attorneys' Fees, at 4 (emphasis added). As we acknowledged in Posada, plaintiffs must show that their work "had a substantial independent effect on the outcome of the preclearance review" and indeed "changed the result that the Attorney General would otherwise have reached." 716 F.2d at 1075. But there is more than one way to change the Attorney General's mind. The district court, and the majority opinion, fail to consider plaintiffs' effects on the defendants in this case. The plaintiffs may have achieved some of the results they sought through the indirect route of influencing the defendants to submit fairer redistricting plans. Although MALDEF pointed repeatedly to the striking similarity between the plan it advocated from the beginning and the plan eventually

submitted by the county, the district court failed to make findings of fact on this issue.

Thus I would remand this case to the district court for a determination as to whether MALDEF achieved its objectives, at least in part, by persuading the county to submit an appropriate plan for approval. This is, as we noted in Posada, "an intensely factual, pragmatic" inquiry. 716 F.2d at 1072. But there can be little doubt that something of the sort described by MALDEF took place. As the majority concedes, "Because of the injunction, Jim Wells County ... submitted three plans in succession to the Justice Department for preclearance." Supra at 507 (emphasis added). And the district court concludes that "Although Plaintiffs were not successful in all of their endeavors, they were successful in enforcing the rights of

the Mexican-Americans to an undiluted vote..." Order Awarding Attorney's Fees, at 8. [3]

The majority seems to acknowledge that Voting Rights Act plaintiffs can often obtain effective relief only by participating in preclearance submissions, but nevertheless denies that Congress intended for such plaintiffs to be compensated for attorney's fees. I find that puzzling. If Congress intended the end, then Congress must be supposed to have intended the means

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[3] As the Supreme Court has recently admonished in a related context, "a plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised... [T]he court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1943, 1940, 76 L.Ed. 2d 40 (1983)(emphasis added).

to that end. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407-22, 4 L.Ed. 579 (1819)("It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution."). And, in fact, Congress expressed its intentions in these matters quite well:

> [I]n voting rights cases .... Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights... A party seeking to enforce the rights protected by the Constitutional clause or statute under which fees are authorized by these sections, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 88 S.Ct. 964 [966], 390 U.S. 400, 402, 19 L.Ed. 1263 (1968) .... Courts have been instructed, since the passage of our first civil rights laws, to use the broadest and most effective remedies available to achieve the goals of these laws, and these remedies have included awards of attorneys' fees as costs.

S. Rep. No. 295, 94th Cong., 1st Sess. 40-42 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 774, 807-09.

Accordingly, I respectfully dissent.[4]

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[4] I do, however, join in the discussion of costs and hourly rates contained in Part V of the court's opinion.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. C-78-87

ALFREDO R. ARRIOLA, et al.,

Plaintiffs,

VS.

HARVILLE, et al.,

Defendants,

[Filed April 19, 1984]

ORDER AWARDING ATTORNEYS' FEES

By its order of October 9, 1979, the three-judge panel in this case enforced Section 5 of the Voting Rights Act, 42 USC § 1973c, in favor of Plaintiffs against the Commissioners Court of Jim Wells County, Texas, by enjoining elections conducted under a 1975 reapportionment of County

precincts until pre-cleared by the Department of Justice. The Court also ruled that a 1974 re-districting plan was a court-approved plan and should be submitted to the Department of Justice for pre-clearance before use pursuant to Section 5 of the Voting Rights Act. Additionally, the Defendants obtained a ruling that the implementation of the 1975 redistricting plan in previous county elections without preclearance had resulted in violation of the rights of the Plaintiffs and their class, as those rights are set forth by the Voting Rights Act. Although Plaintiffs sought to set aside the 1978 party primary elections for County Commissioners and other County offices using the 1975 county precincts and to schedule new elections with an approved plan, the Court denied that relief. Plaintiffs were awarded attorneys' fees as prevailing parties.

42 USC § 1973l*e*.

Plaintiffs' attorneys from the Mexican-American Legal Defense Fund (MALDEF) seek recovery for a total of 262.1 hours for attorneys, and 519 hours for paralegals, divided as follows:

Attorneys	Hours	Hourly Rate	Amount
Joaquin Avila	182.9	$150.00	$27,435.00
Jose Garza	58.2	75.00	4,365.00
Judith Sanders-Castro	21	75.00	1,575.00
Total Amount for Attorneys			$33,375.00

Paralegals

Erlinda Cortez	184.25	40.00	7,370.00
Diana Ross	335.65	35.00	11,747.75
Total Amount for Paralegals			$19,117.75

Grand Total Claimed for Services $52,492.75

To determine the reasonableness of this claim, the Court will first attempt to determine the number of hours reasonably expended in pursuit of the Plaintiffs' case, then multiply that by a reasonable hourly rate. Hours not reasonably expended should be excluded. The product of reasonable hours times reasonable rate does not end the inquiry. Other considerations may require an up or down adjustment, including the important factor of the results obtained. Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

I. Number of Hours:

A) Joaquin G. Avila bills 182.9 hours. He was Plaintiffs' lead counsel and carried the burden of organizing Plaintiffs' evidence and presenting it. His work essentially concluded on October 15, 1979, when the three-judge panel issued an order favorable to the Plaintiffs. The Court

finds that all of his hours claimed were reasonably expended in the pursuit of successful litigation. Although no election was set aside, the Plaintiffs' primary goal of enjoining County elections under an unpre-cleared apportionment plan for county precincts. Accordingly, the Court awards all 182.9 hours claimed by Mr. Avila to the Plaintiffs.

B) Jose D. Garza bills 58.2 hours. Mr. Garza's efforts in this case did not begin until after the panel had enjoined any future county elections based on the unapproved 1975 reapportionment plan. His hours are related solely to analysis of the 1975 re-apportionment plan submitted to the Department of Justice, proposed modifications by the county, preparation and submission of proposed MALDEF plans, and discussions with his clients, other MALDEF staff members, and county officials on

plans to be submitted by the county and MALDEF.

Plaintiffs may recover attorneys' fees in voting rights act cases only for successful activities undertaken in a "proceeding," as that word is used in the Act. The Fifth Circuit has expressed serious doubts that pre-clearance activities are "proceedings" within the meaning of the Voting Rights Act. The need to protect private attorneys is less compelling when the private action occurs in the very context of the Attorney General's statutory responsibility. Accordingly, the 5th Circuit has established specific standards of success to be shown by attorneys for their work in pre-clearance activities. First, the Attorney General must have been dissatisfied with the plan submitted. Second, there must be a showing that Plaintiffs'

participation, through particularly astute criticism or creative legal argument, changed the result that the Attorney General would otherwise have reached. Posada v. Lamb County, Texas, 716 F.2d 1066 (5th Cir. 1983).

Plaintiffs have demonstrated the first part of the test, but not the second. It is apparent that Plaintiffs worked hard in pre-clearance phase and communicated their complaints, but there is no convincing tie-in between Plaintiffs' complaints expressed in their comments to the Attorney General and his results. More important, there is no showing that the Attorney General changed the results he would have achieved because of anything the Plaintiffs did. Accordingly, hours for Mr. Garza are disallowed.

C) For Erlinda Cortez, Plaintiffs claim 184.25 hours as a paralegal. The

services of a paralegal can be recovered as attorney's fees, provided the paralegal performs work traditionally done by an attorney; otherwise, those expenses are separately unrecoverable overhead expenses. Jones v. Armstrong Cork Co., 630 F.2d 324 (5th Cir. 1980); Allen v. United States Steel Corp., 665 F.2d 689 (1982). Of those 184.25 hours, 42.5 hours were spent after the panel's decision of October 9, 1979. Her efforts, like Mr. Garza's, dealt with review and submittal of various plans of the county and the Mexican-American Legal Defense Fund. For the same reasons that Mr. Garza's hours are disallowed, her 42.5 hours expended after the date of the order are also disallowed. The balance of her 141 hours were spent in analyzing county and MALDEF proposals to the Department of Justice, making comments to the Department of Justice on the proposed plans, visiting

with clients to discuss re-districting, and conferring with attorneys. Erlinda Cortez did not appear at the hearing, but her affidavit describing her work with dates and hours, and Mr. Avila's testimony, persuade the Court that generally she was properly working as a paralegal. The Court finds these hours were reasonably expended in behalf of the client and awards them to Plaintiffs.

D) For Diana Ross, the Plaintiffs claim 335.65 hours as a paralegal. All of her work commenced after the October 9, 1979, order requiring pre-clearance. Her work is composed solely of work on plans, both of the county and MALDEF, being submitted to the Department of Justice. Even if she were properly a paralegal, for the same reason that the hours of Jose Garza were disallowed, the hours of Diana Ross are disallowed. Plaintiffs have failed in

their proof to establish the facts required under Posada v. Lamb County, Texas, 716 F.2d 1066 (5th Cir. 1983). There is no direct evidence by testimony or affidavit from the Attorney General or sufficiently convincing circumstantial evidence to demonstrate Plaintiffs influenced the plan. The fact that Plaintiffs were working hard at the Texas end is not proof that the Attorney General's Office responded to that by making any changes that it would not have otherwise have made. Accordingly, Diana Ross's hours must be disallowed.

E) Judith Sanders-Castro claims 21 hours for her services in representing MALDEF in this attempt to collect her fees. Her hours are not opposed.

II. Hourly Rate:

A) Joaquin Avila claims $150 an hour. This Court has already established Mr. Avila's rates for work in a Voting Rights

Act case in the same geographic area and for services rendered at the same time in Mr. Avila's professional career. In LULAC v. Williams, 74-C-95 (S.D. Texas--CC Div., 1982) affd. in part No. 83-2064, 5th Cir. 1984, the Court awarded $75 an hour for time spent in Court, $55 an hour for pre-trial preparation, and $20 an hour for travel. Based on the foregoing, Mr. Avila would be awarded for his services:

49.8 hrs (travel) x $20 an hr.	=	$ 996.00
9.5 hrs. (in-court) x $75 an hr.	=	712.50
123.6 hrs. (preparation) x $55	=	6,798.00
Grand Total		$ 8,506.50

Although this hourly rate is consistent with the market value of his services for an attorney of his experience, Plaintiffs' success in this case entitle him to the

hourly rate charged by one of Defendants' attorneys, Kenneth Oden, an attorney of excellent reputation who has practiced in Jim Wells County for many years, which is $70.00 an hour for all hours. This award of a higher fee is justified because of what the Court finds as an efficient prosecution of his client's claim without excessive hours. Accordingly, the Court awards as follows:

49.8 hrs. (travel) x $20 an hr. =	$ 996.00
9.5 hrs. (in-court) x $70 an hr.=	665.00
123.6 hrs. (preparation) x $70 an hr.=	8,652.00
Grand Total	$ 10,313.00

B) Mrs. Sanders-Castro claims $75.00 an hour. The Court also awards her $70.00 an hour, finding that she is in essentially the same market area and experience level at the same time of professional experience as Mr. Avila when he rendered his services

in Arriola v. Harville and LULAC v. Williams. For her services, she is awarded $1,470.00, as opposed to the $1,575.00 that she claims. The Court finds her fee of $1,470.00 is consistent with a recovery of $10,313.00.

To determine whether these fees should be adjusted, the Court has examined the factors in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), and concludes no adjustment is appropriate, because all factors listed in Johnson are not relevant or subsumed in the Court's consideration of the hours awarded and the hourly rates.

The results obtained were good and evidence of professionally rendered services. Although Plaintiffs were not successful in all of their endeavors, they were successful in enforcing the rights of the Mexican-Americans to an undiluted vote,

but this is not the rare case where there is evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged or that success was exceptional. No multiplier is added. Blum v. Stenson, No. 81-1374, Mar. 21, 1984, slip op., U.S.S. Ct. Excellence of service was acknowledged by increasing Mr. Avila's hourly rate to equal that of Mr. Oden's, and recognizing an efficiently prosecuted claim.

Erlinda Cortez is awarded $20.00 an hour, not the $40.00 claimed, which the Court finds excessive. Although the Court finds she is competent and of value to the Plaintiffs' attorney, there is no independent evidence of the value of a paralegal in the market. She is paid only $6 to $8 per hour, and there is no explanation of her training as a paralegal.

Accordingly, the Court awards as attorneys' fees the sum of $10,313.00, and as paralegal fees the sum of $2,820.00

ORDERED this the 19 day of April, 1984.

/s/ HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. C-78-87

ALFREDO R. ARRIOLA, et al.,

Plaintiffs,

VS.

HARVILLE, et al.,

Defendants,

[Filed April 19, 1984]

JUDGMENT AWARDING ATTORNEYS' FEES

Based on the findings of the Court, it is ordered that Plaintiffs and their attorneys have judgment against Defendants for $13,133.00.

ORDERED this the 19 day of April, 1984.

/s/ HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2421

ALFREDO R. ARRIOLA, et al.,

Plaintiffs-Appellants,

versus

T. L. HARVILLE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 31, 5 Cir., 1986, ___F.2d___)

(Filed February 27, 1986)

Before GOLDBERG, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel

rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. C-78-87

ALFREDO R. ARRIOLA, et al.,
Plaintiffs,

V.

T. L. HARVILLE, et al.,
Defendants.

[Filed August 3, 1984]

ORDER UNDER RULE 60 (a), FEDERAL RULES
OF CIVIL PROCEDURE CORRECTION
PREVIOUS ORDER AND JUDGMENT

Came on to be heard this 3rd day of August, 1984, Plaintiffs' Motion for Relief from Judgment or Order filed pursuant to Rule 60 (a), Fed. R. Civ. Pro., requesting this Court's correction of clerical mistakes existing in its Order Awarding

Attorneys' Fees and Judgment Awarding Attorneys' Fees, issued April 19, 1984. The Court finds that clerical errors due to oversight or omissions have been made in the order and judgment issued awarding Plaintiffs attorneys' fees. This Court determined in the body of the Order Awarding Attorneys' Fees that fees should be awarded for services rendered by both Plaintiffs' attorneys, Joaquin G. Avila and Judith A. Sanders-Castro, for the amounts of $10,313.00 and $1,470.00, respectively. The final paragraphs, page 8, of the Order only reflect the $10,313.00 awarded for Mr. Avila's services. The $1,470.00 award to Plaintiffs for services of Ms. Sanders-Castro has been inadvertently omitted. In the body of the Order Awarding Attorneys' Fees, a mathematical mistake was made in the calculation of paralegal for which fees were awarded. This Court denied fees for

42.5 of the 184.25 hours claimed for services rendered by Plaintiffs' paralegal, Erlinda Cortez. Due to the oversight, fees were awarded for only 141 paralegal hours at $20.00, inadvertently omitting 0.75 hours. Due to the clerical mistakes, through inadvertent omissions and oversights, contained in the Order allowing hours and setting hourly rates for Plaintiffs' attorneys' fee award, the Judgment Awarding Attorneys' Fees also contains a clerical error in the total sum of fees awarded Plaintiffs in judgment against Defendants.

Therefore, IT SO ORDERED that:

1. Paragragh II (B), page 8, of this Court's Order Awarding Attorneys' Fees, wherein it states:

> Accordingly, the Court awards as attorneys' fees the sum of

> $10,313.00, and as paralegal fees the sum of $2,820.00,

is hereby corrected to read as follows:

> Accordingly, the Court awards as attorneys' fees the sum of $11,783.00, and as paralegal fees the sum of $2,835.00, and

2. The Judgment Awarding Attorneys'

Fees, wherein it states:

> Based on the findings of this Court, it is ordered that Plaintiffs and their attorneys' have judgment against Defendants for $13,133.00,

is hereby corrected to read as follows:

> Based on the findings of this Court, it is ordered that Plaintiffs and their attorneys have judgment against Defendants for $14,618.00.

ORDERED this 3 day of August, 1984.

/s/ Hayden W. Head, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX E

FOURTEENTH AMENDMENT, U.S. Constitution

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * * * * * * * *

FIFTEENTH AMENDMENT, U. S. Constitution

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1973c.

> Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title

are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prere-

quisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such

submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise

require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, §5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315, Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.

* * * * * * * * * *

42 U.S.C. § 1973l.

Enforcement proceedings
Attorney's fees

(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub. L. 89-110, Title I, § 14, Aug. 6, 1965, 79 Stat. 445, redesignated Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314, and amended Pub.L. 94-73, Title II, § 207. Title IV, § 402, Aug. 6, 1975, 89 Stat. 402, 404.

* * * * * * * * * * *

42 U.S.C. § 1988.

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so

far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

* * * * * * * * * * *

28 C.F.R. § 51.27

Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which Section 5 applies.

(a) Communications may be in the form of a letter stating the name, address, and telephone number of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect, or simply bringing to the attention of the Attorney General the fact that a voting change has occurred.

* * * * * * * * * * *

28. C.F.R. § 51.39

Standards for determination
by the Attorney General

(d) If the Attorney General determines that a submitted change has the prohibited purpose or effect, an objection shall be interposed to the change.

* * * * * * * * * * *

Supreme Court, U.S.
FILED
JUL 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1954

IN THE

Supreme Court of The United States

OCTOBER TERM, 1986

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR.,
RICARDO TREVINO, JR.

Petitioners

v.

T. L. HARVILLE, LUCILLA DE LEON,
C. W. "DINKY" PRICE, J. B. FREILEY,
W. M. LAUGHLIN, ARNOLDO GONZALEZ,
CHARLES HARLESS, ZARAGOSA GARCIA, JR.,
J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents'

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioners' voluntary and independent participation in the submission and preclearance procedure under Section 5 of the Voting Rights Act comes within the definition of "action" or "proceeding" as those terms are used in 42 U.S.C. Sec. 1973 1(e) of the Voting Rights Act.

2. Whether the Petitioners can be identified as "prevailing parties" in the Section 5 preclearance procedure as that term is used in 42 U.S.C. Sec. 1973 1(e) of the Voting Rights Act.

LIST OF ALL PARTIES IN LOWER COURT PROCEEDINGS

The following is a list of all the parties to the proceedings in the Court whose judgment is sought to be reviewed.

1. Alfredo R. Arriola, Miguel V. Ramirez, Jr. and Ricardo Trevino, Jr., Plaintiffs and Petitioners herein.

2. T. L. Harville, Lucilla De Leon, C. W. "Dinky" Price, J. B. Freiley, W. M. Laughlin, Arnoldo Gonzalez, Charles Harless, Zaragosa Garcia, Jr., J. W. Sutherland, Jim Wells County, Texas, Defendants and Respondents herein.

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No. 85-1954

In The

Supreme Court of The United States

October Term, 1986

Alfredo R. Arriola, Miguel V. Ramirez, Jr.,
Ricardo Trevino, Jr.

Petitioners

v.

T. L. Harville, Lucilla De Leon,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THE OPINIONS BELOW

The citations to the opinions below which appear in the Petition for Certiorari are correct.[1] The opinion of the Court of

[1] For purposes of appropriate references to the record, "R.Vol.1" shall refer to original papers, pleadings, orders, and other memoranda filed in this case, which has been designated as "Record on Appeal, Vol. 1." The reference to "R. Vol. 2" shall refer to the original transcript of proceedings conducted on January 5, 1983, in connection with

Appeals appears in Petitioners' Appendices at page 1a. The opinion of the District Court for the Southern District of Texas rendered on April 19, 1984, is not reported, and it appears in Petitioners' Appendices at page 38a.

STATEMENT OF THE CASE

This suit was filed by Petitioners in the District Court for the Southern District of Texas, Corpus Christi Division in August of 1978, under Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973 (c) wherein Petitioners sought to set aside and enjoin elections conducted in Jim Wells County, Texas pursuant to a 1975 reapportionment plan which had not been precleared by the Justice Department. (Petitioners' Original Complaint at Resp.App.p A-1) The Plaintiffs-Petitioners were Mexican-American registered voters of Jim Wells County, Texas. The Petitioners sought to enjoin the November, 1978, general elections, and such Application for Preliminary Injunction was denied by a single-judge court. The Court then made the determination that a three-judge district court should be convened to hear the case. In a subsequent hearing prior to the trial on the merits, on motion by Petitioners, the case was certified as a class action. On March 19, 1979, the trial on the merits came on to be heard in connection with Petitioners' request for a permanent injunction and related relief, as more particularly described in Petitioners' Original Complaint. On October 9, 1979, the District Court

---

Plaintiffs' Motion for Attorney's Fees and Costs in this cause, including all statements of counsel, the Court, and testimony of the witnesses. The designation "R. Pl. Ex." shall refer to Plaintiffs' exhibits in the Motion for Fees of January 5, 1983, and the designation "R.D.Ex." shall refer to Defendants' exhibits in the Motion for Fees of January 5, 1983. The designation of "R.D.Ex.*" shall refer to Defendants' exhibits in the trial on the merits of March 19, 1979. References to Petitioners' Appendix shall be referred to as "Pet.App.p. . . ." References to Respondents' Appendix shall be referred to as "Resp.App.p. . . ." All underscoring shall be ours unless otherwise indicated.

issued its Order and entered Findings of Fact and Conclusions of Law relative to the case, and the Court enjoined the use of the 1975 reappointment plan in any future county elections unless and until the 1975 plan was precleared according to the provisions of Section 5 of the Voting Rights Act of 1965, as amended in 1975. (Resp.App.p.A-15) Such Order and Findings of Fact and Conclusions of Law were filed with the court on October 15, 1979. In addition, in such Order Petitioners were awarded attorney fees as the prevailing parties.

On May 19, 1982, Petitioners filed their Motion for Attorney Fees and hearing was held on January 5, 1983. In such hearing Petitioners sought an award for their services in the litigation *and* their services for lobbying efforts with the Attorney General in the independent Section 5 preclearance submissions by Jim Wells County to the Justice Department. The District Court awarded attorney fees for all services rendered in connection with the furtherance of the actual litigation, but it denied Petitioners' requested attorney fees for their attorneys' voluntary lobbying efforts in the Section 5 preclearance procedure which was conducted after the injunction was granted and the actual litigation (save and except the attorney fee question) had been terminated. (Pet.App.p.38a) Petitioners' appealed to the Fifth Circuit Court of Appeals, and such court affirmed the judgment of the district court below, save and except the Fifth Circuit Court of Appeals reversed the $20.00 per hour travel time awarded to Petitioners' attorneys. Petitioners' Motion for a Hearing en Banc was denied, and they have subsequently filed their Petition for Writ of Certiorari which is now pending before this court.

STATEMENT OF FACTS

On or about February 5, 1974, pursuant to a suit filed by (73-C-125) the *Jim Wells County Women's Political Caucus et al.* v. *Jim Wells County, Texas, et, al.*, Judge Owen Cox entered a

Court approved reapportionment plan of the Commissioners' precincts of Jim Wells County, Texas. (R.D. Ex. 14*)

On or about July 11, 1975, the Jim Wells County Commissioners Court adopted a new reapportionment plan for the Commissioners' precincts of the County. (R. D. Ex. 1*-D. Ex. 5*)

On September 2, 1975, Jim Wells County Judge T. L. Harville forwarded a letter to the Department of Justice regarding the new reapportionment plan and informing the Department of same. (R. D. Ex. 6*; R. Vol. 1, p. 129, 1. 1-20; R. Vol. 1, p.130, 1. 11)

On January 18, 1977, the newly elected County Attorney, Romeo Flores, forwarded to the Department of Justice the 1975 reapportionment plan for the reason that Mr. Flores did not know if the 1975 plan had been properly submitted to the Department. (R. D. Ex. 7*, 8*)

After numerous exchanges of information and communication between Mr. Flores (in behalf of Jim Wells County) and the Department of Justice regarding submission of the 1975 plan, Mr. Drew Days, in behalf of the Department of Justice, objected to the 1975 reapportionment plan pursuant to Section 5 of the Voting Rights Act by letter dated July 3, 1978. (R. D. Ex. 8*, 10*, 11*, 11A*, 11B*, 11C*, 11D*, 11E*, 12*, 13*, 13A*; R. P. Ex. 18; R. Vol. 2, p. 129, 1. 22- p. 130, 1. 9).

This suit was filed on or about August 4, 1978, wherein Plaintiffs sought the following relief.

a. A declaratory judgment that the 1978 primary elections violated Plaintiffs' rights and the rights of those in their class;

b. An injunction to prohibit the 1978 general election;

c. A declaratory judgment setting aside the primary and general elections conducted under the 1975 reapportionment plan, which included the 1976 primary and general election and the 1978 primary and general election;

d. An order from the court requiring the scheduling of drafting, approval and implementation of a plan for apportionment of County Commissioners' precincts pursuant to Section 5 of the Voting Rights Act;

e. A permanent injunction restraining the County from use of the 1975 reapportionment of County Commissioners' precincts in any future Jim Wells County primary or general election. (R. Vol. 1, p. 272)

On March 19, 1979, trial on the merits was heard before a three-judge Court composed of the Honorable Judge Gee, the Honorable Judge Cox, and the Honorable Judge O'Connor. (R. Vol. 1, p. 197)

On October 15, 1979, the Court entered Findings of Fact and Conclusions of Law relative to this case, to which reference is made for all purposes, and it entered a permanent injunction prohibiting the use of the 1975 reapportionment plan of the Jim Wells County Commissioners' precincts in any future County elections unless and until the 1975 plan was precleared according to the provisions of Section 5 of the Voting Rights Act of 1965, as amended in 1975. (R. Vol. 1, p. 197)

The sole relief granted in this trial related to the prohibition of the future use of the 1975 reapportionment plan for Commissioners' precincts in the county, and upon entry of this order on October 15, 1979, there being no appeal therefrom, all matters in controversy between the parties had been determined by such order, save and except the question of attorney fees and costs related to the trial. (R. Vol. 1, p. 197)

After the entry of the October 15, 1979, order, the Defendants comprising the Jim Wells County Commissioners Court promptly initiated efforts to formulate a reapportionment plan to be submitted to the Attorney General for preclearance. (R. Vol. 2, p. 131, l. 2) The Commissioners Court was unsure as to the information needed by the Attorney General. (R. Vol. 2, p. 131, l. 7) The Commissioners Court entertained and reviewed numerous reap-

portiontment plans that were proposed by interested citizens, both Mexican-American and anglo, and by governmental entities and community action groups, and by the Commissioners themselves, and by the Plaintiffs through MALDEF representatives. (R. Vol. 2, p. 131, l. 2 – p. 133, l. 23) During this period of time, three separate plans were submitted to the Justice Department. Objections were made to the first two plans by the Department of Justice (R. P. Ex. 22; P. Ex. 24), and the third plan submitted was approved in October of 1981. It is the current plan used by the county. In each instance that a plan was submitted to the Justice Department, it was first approved by a majority of the Commissioners Court and then submitted to the Department. The Commissioners Court considered and evaluated all suggestions, ideas and proposals of all interested individuals and action groups prior to the approval and submission of each of their proposed reapportionment plans. (R. Vol, 2, p. 131, l. 2 – p. 133, l. 23) In connection with this entire preclearance procedure and the submission of the various reapportionment plans, the Attorney General received information, comments, and recommendations from several independent sources, and in October, 1981, the Attorney General approved a reapportionment plan, submitted by the county and rejected by the Plantiffs. (R. Vol., 2, p. 132, l. 4 – l.25; p. 89, l. 13 – l. 17; R. P. Ex. 22, p. 1; P. Ex. 24, p. 1; R. Vol. 2, p. 131, l. 2 – p. 133, l. 23; R. Vol. 2, p. 133, l. 21 – p. 134, l. 17)

Thereafter, the Petitioners filed their Motion for Attorney Fees in the District Court, wherein they claimed credit for a reapportionment plan that they had theretofore rejected. In addition, Petitioners claim and still claim they were entitled to attorney fees for the services of their attorneys after the termination of litigation and the entry of the court's order of October 15, 1979, in connection with their lobbying efforts with the Attorney General in the county's independent submission of its reapportionment plans to the Justice Department in accordance with Section 5 of the Voting Rights Act.

SUMMARY OF THE ARGUMENT

In spite of Petitioners' artful attempt to categorize the Justice Department's role in the Section 5 preclearance and submission procedure as the "remedy phase" or an "ancillary proceeding," it is clear that the Congressional intent and the application of such intent through previous judicial interpretation and case precedent indicates that the Section 5 preclearance process is not an "action" or "proceeding" within the meaning of 42 U.S.C. Sec. 1973 l(e). Applicable expressions of Congressional intent on this point indicate that the use of the terms "action" or "proceeding" means judicial actions or suits brought in the course of litigation in a state or federal court or in a state or federal agency between adverse parties for the adjudication of matters in controversy between such parties. The terms "action" and "proceeding" as used in the Voting Rights Act contemplate an adversary proceeding which is subject to an appeal procedure, and upon the conclusion of such litigation and the controversy, one of the parties shall be a "prevailing party." In connection with voting rights infringement cases, the provisions of 42 U.S.C. Sec. 1973 l(e) and 42 U.S.C. Sec. 1988 certainly contemplate that "actions or proceedings" may be initiated to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, and that attorney fees may be awarded an aggrieved private party wherein they have "prevailed" in the "action" or "proceeding." However, the preclearance process is not a private enforcement proceeding within the meaning of the Voting Rights Act.

The Section 5 preclearance and submission procedure provides a definite procedure to alter the voting qualifications, practices or standards of a state or political subdivision covered under the Voting Rights Act. The Attorney General of the United States has complete and total control and discretion in connection with the approval or objection to a submitted voting change, and the decision of the Attorney General is not subject to appeal. In the

preclearance process there is no "prevailing party," no adversary proceeding, no pleadings or judgment and no adjudication of rights. The Attorney General simply either approves or disapproves the submitted voting change as a function and responsibility of this portion of the executive branch of government. In this preclearance function, the Attorney General does not adjudicate nor does it serve in any capacity as a judicial body.

The distinction between "actions" or "proceedings" under the Voting Rights Act and the executive duties of the Attorney General in the preclearance process has been made clear through applicable authority and precedent; and, simply stated, the preclearance process is not an "action" or "proceeding" within the meaning of the Voting Rights Act.

The Court of Appeals has correctly applied applicable precedent in connection with the denial of attorney fees for Petitioners' lobbying efforts and activities in the preclearance procedure for Jim Wells County, Texas, independent submission of their reapportionment plans to the Attorney General. It is clear that the Petitioners failed to show that their involvement and participation in the preclearance process changed the results or opinion that the Attorney General would otherwise have reached in considering the Respondents' reapportionment plans; and the Petitioners' activity in the submission process was not in the furtherance of the litigation between the parties, but rather, it occurred after the litigation had terminated and the issues in controversy had been judicially resolved.

REASONS FOR THE DENIAL OF THE WRIT

ARGUMENT

I. THE SECTION 5 PRECLEARANCE PROCESS UNDER THE FACTS OF THIS CASE IS NOT AN "ACTION" OR "PROCEEDING" WITHIN THE MEANING OF 42 U.S.C. Sec. 1973 1(e).

The Petitioners' goals, objectives and requested relief in connection with this suit were best expressed originally in their complaint and Application for Injunction. (Resp. App. p. A-1) Although numerous claims and requested relief by Petitioners were denied in the trial on the merits, the three-judge Court did enter a permanent injunction prohibiting the use of the 1975 Reapportionment Plan of the Jim Wells County Commissioners precincts in any future county elections unless and until the 1975 Plan was precleared according to the provisions of Section 5 of the Voting Rights Act. The primary question in the trial on the merits dealt with the issue of whether the county had complied with the Section 5 preclearance process. Because of the nature and timing of the original communications and submissions between the county and the Justice Department on the county's submission of the 1975 Reapportionment Plan, there was an open question concerning the county's compliance with the Section 5 preclearance process. Once that question was determined and the three-judge-court ruled that the 1975 plan had not been properly precleared, the Commissioners Court did not appeal the order, and promptly initiated efforts to formulate a Reapportionment Plan to be submitted to the Attorney General for preclearance. (R. Vol. II, p. 131, l. 2) The order of the three-judge court had determined and settled all issues and claims in controversy between the parties save and except the question of attorney fees and the controversies between the parties have been fully adjudicated. As to the issues adjudicated by the three-judge court, the Petitioners have been found to be "prevailing parties," and they have properly been awarded attorney fees for such proceeding.

Petitioners now make claim for their attorney fees and costs incurred in their voluntary involvement in the Section 5 preclearance process that occurred with the Department of Justice after the final adjudication of issues in this case, and after the entry of the order of the District Court on such issues. The key question of this appeal pertains to the Petitioners' right, if any, to claim additional attorney fees for their voluntary involvement in

the Section 5 preclearance process for which the Attorney General is solely responsible. These Respondents object to any award to Petitioners for attorney fees and costs incurred by Petitioners in the preclearance process that occurred after the District Court's order of October 15, 1979, for the reason that such services were not rendered in an "action or proceeding" for enforcement of the provisions of U.S.C. Sec. 1973 l(e) and 42 U.S.C. Sec. 1988 by a private party or person.

The provisions of 42 U.S.C., Sec. 1973 1(e) and 42 U.S.C., Sec. 1988 certainly contemplate that "actions or proceedings" may be initiated to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, and that such action may be initiated by the Attorney General or by an aggrieved person or persons. *Allen* v. *State Board Elections,* 89 S.Ct. 817 (1969). In accordance with the above statutory provisions, attorney fees may not be awarded in those instances wherein the Attorney General enforces such provisions, and they may only be awarded when the action or proceeding is initiated and enforced by one or more aggrieved private parties, and such fees are only awarded wherein such party has "prevailed" in the action or proceeding. 42 U.S.C., Sec. 1973 1(e).

In those instances wherein the enforcement is by private party, such individual either files a suit in the appropriate Federal or state court, or he files a complaint with an appropriate Federal or state agency. In either event the person enforcing the aforementioned provisions is a *necessary party* to the "action or proceedings," and the rights of such party are adjudicated by the court or the administrative agency. In either event, the initial adjudication, whether by state or Federal court, or whether by state or Federal agency, is subject to an appeal procedure. The process of enforcement by private party is best illustrated by *New York Gas Light Club, Inc.* v. *Carey,* 100 S. Ct. 2024 (1980). In the *New York Gas Light* case, the Supreme Court has identified the type of proceedings in Title VII cases that authorize a fee award to a

prevailing party. The court states that the statute uses the word "proceeding" to describe the remedies to which "complaintants *are required* to resort" for enforcement of the statute. It seems clear from the ruling in such case that in those instances wherein the "complaining party" is a necessary party to the proceeding, or wherein the proceeding is an adversary proceeding, or wherein the rights of the party are to be adjudicated in the proceedings, that such "proceeding" shall authorize a fee award to a prevailing party or person within the context of 42 U.S.C., Sec. 1973 1 (e) and 42 U.S.C., Sec. 1988.

By contrast, the preclearance provisions of Section 5 of the Voting Rights Act [42 U.S.C. Sec., 1973 (c)] provides for a definite procedure to alter the voting qualifications, practices or standards of a state or political subdivision covered and included within this Act. As stated in such provision, in order to alter the voting practices within the political subdivision, an action may be initiated in the United States District Court for the District of Columbia for a declaratory judgment that such altered voting practice does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or alternatively, the altered voting practice may be submitted by the chief legal officer of the political subdivision to the Attorney General for approval. 42 U.S.C., Sec. 1973 (c).

In connection with such provisions, the Department of Justice has enacted regulations to administer the aforementioned statute. These regulations have the same effect and legal import as Federal law, and these provisions are embodied in 28 C.F.R. part 51 et seq., *Harris* v. *Levi,* 416 F. Supp. 208 (D.C.D.C., 1976), affirmed in part, vacated in part on other grounds and remanded, 562 F.2d 772. These administrative procedures provide detailed guidelines for a political subdivision in attempting to comply with the provisions of 42 U.S.C. Sec. 1973 (c). If a reapportionment plan is submitted to the Attorney General for approval, such approval or disapproval is within the sole discretion of the Attor-

ney General, which discretion is based upon relevant judicial decisions, a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation, surveys or information secured independently by the Department of Justice. (28 C.F.R., 51.28)

Regardless of the decision of the Attorney General to approve or object to the submitted voting change, there is no appeal that can be made from this decision. *Briscoe* v. *Bell,* 97 S. Ct. 2428 (1977); *Morris* v. *Gressette,* 97 S.Ct. 2411 (1977. The only remedy available to the political subdivision is to attempt to comply under the Act by means of a suit for declaratory judgment in the Federal District Court of the District of Columbia. It is obvious from a study of these regulations that the only required parties in interest are the submitting political subdivision and the Attorney General. During the submission period, the submitting authority, and any other person or group, may submit information to the Attorney General (28 C.F.R., 51.28), but only the submitting party and the Attorney General are necessary parties to this procedure. The participation of any other person in disseminating information to the Attorney General is done strictly on a voluntary basis, and not on a *required* basis. Therefore, there is no adversary procedure or proceeding between any one of the parties, whether such parties are mandatory parties or voluntary party participants.

The preclearance procedure outlined in 42 U.S.C., Sec. 1973 (c) and in related Department of Justice regulations (28 C.F.R. 51 et seq.), *are not enforcement proceedings* under this Act, but rather they are the statutory and regulatory *guidelines for compliance* under this Act. Enforcement proceedings by the Attorney General or private party under this Act only arise after there has been a refusal to abide by these guidelines by the political subdivision. The enforcement actions or proceedings, contem-

plated by this Act that may then be initiated by the Attorney General or by a private party are as follows:

1. An individual or group of individuals may file a suit for a declaratory judgment and/or injunctive relief to prohibit violation of the section; or

2. The Attorney General may file a suit for declaratory judgment and/or injunctive relief to prohibit violation of the section. *Allen* v. *State Board of Elections,* 89 S. Ct. 817 (supra); *Heggins* v. *City of Dallas,* 469 F. Supp. 739 (D.C. Tex., 1979); *Horry County* v. *United States,* 449 F. Supp. 990 (D.C.D.C., 1978); *Citizens Committee to Oppose Annexation* v. *City of Lynchburg, Va.,* 400 F. Supp. 68 (D.C. Va., 1975); affirmed in part, vacated in part on other grounds, 528 F. 2d 816; appl. denied 96 S. Ct. 766.

The enforcement relief that a private litigant is entitled to for violation of 42 U.S.C. 1973 (c) is a judicial declaration that the political subdivision enactment in question falls under the requirements of the above provision, and an injunction against the enforcement of the political subdivision enactment until such subdivision has properly complied with the provisions under this section. *Weber* v. *White,* 442 F. Supp. 416 (D.C. Tex. 1976).

The statutory design of the preclearance process is "independent of private remedies for the enforcement of the Voting Rights Act," and therefore, it cannot be said that Congress intended the preclearance process to be an integral part of private enforcement mechanisms. *Posada* v. *Lamb County*, 716 F. 2d 1066 (5th Cir., 1983) Although the *Posada* court recognized that there was no textual interpretation of the word "proceeding," as used in Section 1973 l(e) and Section 1988 of the Voting Rights Act to indicate that the term "proceeding" would include preclearance procedures, the court recognized that the terms "proceeding" and "action" were used interchangeably throughout the statute to refer to *judicial proceedings.* Although it was not necessary in the

Posada case for the court to reach the threshold question of whether the terms "proceeding" or "action" would include the preclearance process, the court strongly and clearly inferred to the contrary; that such preclearance process was not within the meaning of the terms "action" or "proceeding."

Since the *Posada* case, the precise question in issue in this case has been determined in *Gerena-Valentin* v. *Koch*, 739 F. 2d 755 (2nd Cir., 1984), and a detailed study of the legislative history and the Congressional intent regarding such issue is presented in the case. In such case, the court holds that:

> "There is thus little or no textual warranty for a construction for the fee awards provision which applies it to lobbying in preclearance reviews not in aid of catalytic litigation.
>
> "The legislative history also contains no suggestion that awards of attorney's fees can be made for work solely in connection with preclearance reviews. We set out in the margin portions of the abundant legislative history indicating that the purpose of counsel fee awards under Section 1973 1(e) was to encourage meritorious litigation. No indication of an intent to award fees for efforts in a preclearance review can be found in that history."[2]

The decision of the Court of Appeals in this case is consistent with both Congressional intent and applicable authority which is

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[2] The court analyzed expressions of Congressional intent by an analysis of the Senate report on Section 1973 (c) and Section 1973 1(e) of the Voting Rights Act as stated in S. Rep. No. 295 94th Cong., 1st Sess. 40 (1975), reprinted in 1975 in U.S. Code Cong. & Ad. News, 774, 807. The legislative history to both Section 1973 1(e) and Section 1988 indicate that they were intended to create consistency in fee award standards in civil rights cases. The court also analyzed S. Rep. No. 1011 94th Cong., 2nd Sess. 1-4 (1976), reprinted in 1976 in U.S. Code Cong. & Ad. News, 5908-12, as regards the Congressional intent of attorney fees under Section 1988. "Nothing in the legislative history of Section 1988 suggests that Congress contemplated fee awards for work done in administrative proceedings unrelated to successful litigation. A contrary intent is indicated by the following excerpts from the Senate and House reports: ... (citing specific references)".

directly on point with the question of law before this court. Accordingly, this Petition for Writ of Certiorari should be denied.

II. THE TERM, "PREVAILING PARTY," HAS NO APPLICATION TO THE SECTION 5 PRECLEARANCE PROCEDURE, AS OUTLINED IN THE VOTING RIGHTS ACT, AND AS CODIFIED IN THE CODE OF FEDERAL REGULATIONS, 28 C.F.R., Section 51 et seq.

In accordance with 42 U.S.C. Sec. 1973 1(e), in addition to the requirement that the controversy must be an "action" or "proceeding" to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, the parties seeking payment of reasonable attorney fees incurred in the litigation or action must be a "prevailing party." It has been well established that a party must be a "prevailing party" in order to be awarded attorney fees under this Act. *Ward* v. *Dearman,* 626 F. 2d 489 (5th Cir., 1980); *Bly* v. *McLeod,* 605 F. 2d 134 (4th Cir., 1979), cir. denied 100 S.Ct. 1350

In connection with the term "prevailing party," the preclearance procedure outlined in 42 U.S.C. Sec. 1973 (c) and related regulations do not contemplate an adversary proceeding or any "prevailing party." Such provisions are simply guidelines for compliance with this Act. A political subdivision either complies under the Act, or it does not. The very nature of this Act and the provisions require that the Attorney General shall always have matters determined as he chooses, unless the political subdivision files suit for a declaratory judgment in the Federal District Court of the District of Columbia. "Once a plan has been submitted to the Attorney General, although interested parties may voice their opposition to or support of the plan, the final decision is the Attorney General's alone." *Commissioners Court of Medina County, Texas* v. *United States,* 683 F. 2d 435 (D.C. Cir., 1982)

If by the very nature of the preclearance procedure it is not an enforcement action under the Voting Rights Act, and if in such

preclearance procedure there can be no determination of a "prevailing party," then there can be no award for attorney fees for such private party services in the preclearance process.

Accordingly, for the reasons stated above, the Petition for Writ of Certiorari should be denied.

III. THE COURT OF APPEALS' DECISION CORRECTLY APPLIED *WEBB* v. *BOARD OF EDUCATION OF DYER COUNTY*, AND APPLICABLE AUTHORITIES.

Prior to the Fifth Circuit's opinion in *Arriola et al.* v. *Harville et al.*, 781 F. 2d 506 (5th Cir., 1986), such court had expressly withheld opinion on the question of the applicability of attorney fees for services rendered in preclearance activities, stating, however, that if such fees can be obtained at all,

> "the award must be justified by showing that the private objectors' participation through particularly astute criticism or creative legal argument, changed the result that the Attorney General would otherwise have reached. We will not presume that the Attorney General has failed adequately to satisfy his statutory obligations to enforce the public interest in compliance with the voting rights legislation, or that the reservations the Attorney General voiced would have passed unnoticed absent objections filed by private parties."

Posada v. *Lamb County, Texas*, supra, at page 1075; citing *Donnell* v. *United States*, 682 F. 2d 240 (D.C. Cir., 1982)

On Petitioners' Motion for Attorney's Fees and Costs, the District Court has expressly found that there was "no convincing tie-in between Petitioners' complaints expressed in their comments to the Attorney General and his results" and that there was "no showing that the Attorney General changed the results he would have achieved because of anything the Petitioners did."

Rule 52 (a) of the Federal Rules of Civil Procedure provides that "findings of fact shall not be set aside unless clearly erroneous." F.R.C.P., p. 52(a) As the fact finder in this case, it was

the District Court's province to determine and resolve conflicts in the testimony. The findings and conclusions made by the District Court on the issue of whether the Petitioners' involvement in the preclearance process had a substantial independent effect on the outcome of the preclearance decision of the Attorney General cannot be set aside unless such findings and conclusions are clearly erroneous. *Pullman-Standard* v. *Swint,* 102 S.Ct. 1781, 1788 (1982) The evidence in this case clearly supports the District Court's findings and conclusions. Petitioners' own lead counsel, Mr. Avila, testified that he had no knowledge that the decisions made by the Justice Department to object to any reapportionment plans submitted by Jim Wells County were based upon the comments or recommendations of MALDEF. (R. Vol. 2, p. 91, l. 3) He further stated that the Justice Department's information and letters of objection to the Jim Wells County Reapportionment Plans could have been made independent of the comments and recommendations of MALDEF. (R. Vol. 2, p. 91, l. 13)

There is ample evidence that the Attorney General in the preclearance process was receiving information, comments and recommendations from several independent sources, including individuals from the Jim Wells County community, the Commissioners Court, the Council of Governments, various commissioners and MALDEF. (R. Vol. 2, p. 132, l. 4-25; R. Vol. 2, p. 89, l. 13-17; R. Pl. Ex. 22, p. 1; R. Pl. Ex. 24, p. 1)

Although Petitioners now for the purposes of this appeal take credit for the approval of the 1981 Jim Wells County Reapportionment Plan, the Plan actually originated in the Commissioners Court. (R. Vol. 2, p. 133, l. 21) The plan that was approved by the Attorney General (this plan is now in force in Jim Wells County) was rejected as unsatisfactory by the Petitioners prior to its submission and approval. (R. Vol. 2, p. 134, l. 11) Nonetheless, such plan was submitted and approved by the Attorney General without the approval of Petitioners. (R. Vol. 2, p. 134, l.

21) The approval or objection to such plan by the Attorney General is not subject to judicial review [*Briscoe* v. *Bell,* 97 S. Ct. 2428, 1977; *Morris* v. *Gressette,* 97 Sup. Ct. 2411, (1977)], and Petitioners have now quickly taken credit for the approval of such plan.

The evidence presented by Petitioners in connection with their claim that the Attorney General was motivated in his decision by the actions of Petitioners and their attorneys is nothing more than sheer speculation and conjecture, as such decision, in the words of Petitioners' own counsel, could have been made independently from any actions of Petitioners.

Therefore, the decision of the Court of Appeals was not inconsistent with the *Posada* case except that the *Arriola* court did pass on the ultimate question of the applicability of attorney fees for preclearance activities.

Petitioners also maintain that the Court of Appeals has misconstrued *Webb* v. *Board of Education of Dyer County,* 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985). Petitioners also cite as applicable precedent *Hensley* v. *Eckerhart,* 461 U.S. 424; 103 S. Ct. 1933; 76 L. Ed. 2d 40 (1983). Respondents disagree that the foregoing cases have been misapplied. In fact, such cases support the decision of the Court of Appeals and are applicable and in point to the decision in the court below.

The gist of the decision in *Webb* is that a prevailing party can recover attorney fees in an ancillary administrative proceeding if the services rendered were both useful and of a type ordinarily necessary for the successful advancement of the civil rights litigation. *Hensley* holds that compensation should be provided only for those hours which are reasonably expended on the *litigation.*

Under either decision, the Petitioners cannot prevail for the following reasons:

1. There was no evidence to support any contention that the Petitioners' efforts were useful to the Attorney General in his ultimate decision not to object to the current Jim Wells County reapportionment plan. In fact, the express finding of the District Court was that there was no convincing tie-in between the efforts of Petitioners and the decision of the Attorney General;

2. In the light of applicable authority cited herein, it is doubtful as to whether the preclearance process can be characterized as an ancillary administrative "proceeding" for which the recovery of attorney fees would be awarded;

3. The voluntary lobbying efforts of Petitioners and their attorneys in the preclearance process is not the type of service or work product that is ordinarily necessary to advance the litigation, in light of the fact that Petitioners' communications are not necessary to any decision that will be made by the Attorney General; and moreover, the decision of the Attorney General can be made upon information which is totally independent of any information or activities of the Petitioners or their attorneys;

4. The voluntary lobbying efforts of the Petitioners and their attorneys were not conducted in the furtherance of the litigation, nor was any issue determined in the preclearance process which was utilized in the litigation; and in fact, the litigation had terminated and all issues in controversy as set out by the pleadings had been resolved by the Court's Order of October 15, 1979. The Petitioners' subsequent involvement in the preclearance process was conducted independently of the litigation, and after its termination.

It is indeed very convenient for Petitioners to now say that their participation in the preclearance process was necessary to the accomplishment of their full relief. However, in accordance with their requested relief in their pleadings and the rulings of the

three-judge court, they received all the relief to which they were entitled, and attorney fees were awarded in connection with such a relief. During the preclearance and submission procedure of Jim Wells County, the participation of the Petitioners was not necessary for the ultimate decision of the Attorney General. As stated in *Posada*, the courts will not presume that the Attorney General will fail to adequately satisfy his statutory obligations to enforce and protect the public interest in compliance with voting rights legislation; nor will the courts assume that the decisions of the Attorney General would not have been made but for the objections of private parties. *Posada* v. *Lamb County*, supra, at page 1075.

Therefore, in line with the foregoing, the Petitioners cannot be heard on their claim that their participation in the preclearance process was essential to the litigation, or that such participation in any manner motivated the decision of the Attorney General.

CONCLUSION

Accordingly, for the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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Clerk, U.S. District Court
Southern District Of Texas
FILED
Aug. 4, 1978
V. Bailey Thomas, Clerk
Deputy: C. MARBLE

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR. and RICARDO TREVINO, JR., Individually and On Behalf of All Others Similarly Situated,

Plaintiffs

v.

T. L. HARVILLE, Individually and in His Official Capacity as Jim Wells County, Texas, County Judge; LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY and W. M. LAUGHLIN, Individually and in Their Official Capacities As County Commissioners of Jim Wells County, Texas; ARNOLDO GONZALEZ, Individually and in His Official Capacity as Jim Wells County, Texas, County Clerk; CHARLES HARLESS, Individually and in His Official Capacity as Sheriff of Jim Wells County, Texas; ZARAGOZA GARCIA, JR., Individually and in His Official Capacity as Democratic Party Chairman of Jim Wells County, Texas; J. W. SUTHERLAND, Individually and in His Official Capacity as Republican Party Chairman of Jim Wells County, Texas, and Jim Wells County, Texas.

Defendants

CIVIL ACTION
NO. C-78-87

COMPLAINT

1. This is an action seeking to enjoin the Defandants, and all their successors in interest, from holding general elections under

the apportionment plan governing the election of the commissioners, constables and justices of the peace of the County Commissioners' Court of Jim Wells County, Texas, and to set aside the party primaries for these offices. This apportionment plan was objected to by the United States Attorney General pursuant to the Voting Rights Act of 1965 on July 3, 1978. The apportionment plan is, therefore, without legal force or effect. Plaintiffs pray for an injunction of any further primary or general elections under the illegal apportionment plan, and for a schedule requiring the drawing up and submission for approval under the Voting Rights Act of a plan of apportionment in time for the November, 1978, general elections or soon thereafter.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 42 U. S. C. § 1973c and 28 U. S. C. § 2201.

PLAINTIFFS

3. Plaintiff Alfredo R. Arriola is a registered voter who resides in County Commissioner's Precinct No. 1, Jim Wells County, Texas. He is a United States citizen of Mexican descent.

4. Plaintiff Miguel V. Ramirez, Jr. is a registered voter who resides in County Commissioner's Precinct No. 1, Jim Wells County, Texas. He is a United States citizen of Mexican descent.

5. Plaintiff Ricardo Trevino, Jr. is a registered voter who resides in County Commissioner's Precinct No. 2, Jim Wells County, Texas. He is a United States citizen of Mexican descent.

DEFENDANTS

6. Defendant T. L. Harville is the duly elected and acting County Judge for Jim Wells County, Texas. In his capacity as County Judge, Defendant Harville is presiding officer and member of the Jim Wells County, Texas, County Commissioners' Court, and a member of the County Election Board. Defendant Harville is authorized by TEX. ELECTION CODE art. 4.02 to order the election of and issue writs of election for the election of county commissioners in Jim Wells County.

7. Defendant Lucilla De Leon is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 1, and in this capacity is a member of the Jim Wells Commissioners' Court.

8. Defendant C. W. "Dinky" Price is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 2, and in this capacity is a member of the Jim Wells County Commissioners' Court.

9. Defendant J. B. Freiley is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 3, and in this capacity is a member of the Jim Wells County Commissioners' Court.

10. Defendant W. M. Laughlin is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 4, and in this capacity is a member of the Jim Wells County Commissioners' Court.

11. Defendants Harville, De Leon, Price, Freiley and Laughlin comprise the Jim Wells County Commissioners' Court and are hereby authorized by the Texas Constitution, TEX. CONST. art. 5 § 18, to divide the county into four county commissioners' precincts, with one commissioner to be elected from each precinct.

12. Defendant Arnoldo Gonzalez is the duly elected and acting County Clerk of Jim Wells County, Texas, and by virtue of that office is a member of the Jim Wells County Election Board.

13. Defendant Charles Harless is the duly elected and acting Sheriff of Jim Wells County, Texas, and by virtue of that office is a member of the Jim Wells County Election Board.

14. Defendant Zaragoza Garcia, Jr. is the duly elected and acting chairman of the Jim Wells County Democratic Party, and by virtue of that office is a member of the Jim Wells County Election Board and charged with the responsibility of conducting the Democratic primaries in Jim Wells County, Texas.

15. Defendant J. W. Sutherland is the duly elected and acting chairman of the Jim Wells County Republican Party, and by virtue of that office is charged with the responsibility of conducting the Republican Party primaries in Jim Wells County, Texas.

16. Defendants Harville, Gonzalez, Harless, Garcia and Sutherland, as Jim Wells County Judge, Jim Wells County Clerk, Jim Wells County Sheriff, Jim Wells County Democratic Party Chairman and Jim Wells County Republican Party Chairman, respectively, are required pursuant to TEX. ELECTION CODE art. 7.07 to sit as the County Election Board to furnish necessary supplies such as ballot boxes, guard rails, and voting machines to hold and conduct elections for the Jim Wells County Commissioners' Court.

17. Defendant Jim Wells County is a political subdivision subject to the requirements of the Voting Rights Act of 1965, as amended.

18. Defendants Harville, De Leon, Price, Freiley, Laughlin, Gonzalez, Harless, Garcia and Sutherland are both sued in their official and in their individual capacities.

CLASS ACTION

19. Plaintiffs bring this action pursuant to Rule 23(b) (2), F.R. CIV. P., on their own behalf and on behalf of all Mexican Americans whose right to vote has been or will be abridged by the present apportionment scheme of the Jim Wells County Commissioners' Court. The class is so numerous as to make joinder of all members impracticable. There are questions of law and fact common to each member of the class, and the claims of the representative Plaintiffs are typical of the claims of all members of the class. The representative Plaintiffs will fairly and adequately protect the interests of the class. The Defendants have acted and failed or refused to act on grounds and in a manner generally applicable to the Plaintiff class, and injunctive relief is therefore appropriate with respect to the class as a whole.

FACTS

20. On August 6, 1975, the Voting Rights Act of 1965 was extended and amended to cover the State of Texas. States and political subdivisions covered by the Act must comply with certain specified procedures. Among them is the requirement that all qualifications, prerequisites, standards, practices, or procedures with respect to voting different from those in effect on November 1, 1972, must be adjudged by either the United States Attorney General or the U. S. District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

21. On August 11, 1975, Jim Wells County Commissioners' court instituted a new apportionment plan for the Jim Wells County Commissioners' Precincts. This new reapportionment plan constituted a voter qualification, prerequisites to vote, or standard, practice, or procedure with respect to voting different from those in effect on November 1, 1972.

22. Upon information and belief, the Jim Wells County apportionment was deemed completely submitted to the Justice Department on May 5, 1978.

23. On July 3, 1978, the United States Attorney General objected to the reapportionment of Jim Wells County. (See Plaintiffs' Exhibit No. 1.).

24. Upon information and belief no action has been instituted in the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act of 1965 for a declaratory judgment that the 1975 reapportionment of the Jim Wells County Commissioner Precincts, neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in an applicable language minority group.

CAUSE OF ACTION

25. In respect to this cause of action, Plaintiffs reallege and incorporate all the allegations contained herein.

26. This action arises under the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Since the August 11, 1975 redistricting plan was not precleared by the United States Attorney General, the election change is unenforceable. Any elections conducted pursuant to this election change are void and will violate the rights of Plaintiffs and their class as secured by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Unless enjoined, Defendants will conduct the November 1978 general elections pursuant to an election change clearly in violation of the Voting Rights Act.

27. This is also an action for declaratory, preliminary, and permanent relief instituted pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2201. Plaintiffs seek a declaration that the 1978 party primary elections conducted pursuant to the August 11, 1975 reapportionment violated the rights of Plaintiffs and their class as

secured by the Voting Rights Act. Plaintiffs also seek a declaration that any future elections conducted pursuant to the August 11, 1975 reapportionment will continue to be in violation of the rights of Plaintiffs and their class as secured by the Voting Rights Act.

28. Plaintiffs and their class have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from Defendants' unlawful practices. Plaintiffs and their class will continue to suffer irreparable injury from Defendants unless enjoined by this Court.

REQUEST FOR A THREE JUDGE COURT

29. Pursuant to 42 U.S.C. § 1973c, a district court of three judges is requested at the earliest possible date to determine the matters contained in Plaintiffs' cause of action.

PRAYER

WHEREFORE, Plaintiffs and their class respectfully pray that this Court:

A. Determine by order pursuant to Rule 23 of the Federal Rules of Civil Procedure that this action be maintained as a class action;

B. Grant a declaratory judgment that Defendants' actions violate the rights of Plaintiffs and their class as secured by the Voting Rights Act, 42 U.S.C. § 1973c;

C. Grant any preliminary and permanent injunctive relief enjoining Defendants, their successors in office, agents, employees, attorneys and those persons acting in concert with them or at their direction from holding further elections implementing any objectionable election change until and unless

such election change has been approved pursuant to Section 5 of the Voting Rights Act;

D. Grant other appropriate relief to order a schedule for the drafting, approval and implementation of a reapportionment plan pursuant to Section 5 of the Voting Rights Act of 1965;

E. Grant an Order setting aside the 1978 party primary elections for the offices of county commissioners and other offices utilizing the objectionable County Commissioner Precincts as districts;

F. Grant an Order for a new election schedule utilizing a reapportionment plan which has been precleared pursuant to Section 5 of the Voting Rights Act of 1965;

G. Grant other costs to the Plaintiffs and a reasonable award of attorneys' fees;

H. Retain jurisdiction until all orders and mandates of the Court have been complied;

I. Grant such other and further relief as the Court may deem just and proper.

Dated: August 3, 1978

Respectfully submitted;

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By JOAQUIN G. AVILA
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Attorneys for Plaintiffs

STATE OF TEXAS }
COUNTY OF BEXAR }

BEFORE ME, on this day personally appeared Joaquin G. Avila who after being by me first duly sworn on his oath, deposes and says as follows:

1. My name is Joaquin G. Avila. I am employed by the Mexican American Legal Defense and Educational Fund, 201 N. St. Mary's Street, Suite 517, San Antonio, Texas 78205.

2. That the attached letter is a duplicate copy of the original letter received in our office; that the reason for said duplication is that the original letter was illegible.

Further in this matter affiant sayeth not.

JOAQUIN G. AVILA
JOAQUIN G. AVILA

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 3rd day of August, 1978.

REBECCA V. GARCIA
Notary Public in and
for Bexar County, Texas

(SEAL)

MY COMMISSION EXPIRES SEPT. 1, 1978.
REBECCA V. GARCIA
Notary Public

July 3, 1978

Mr. Romeo Flores
County Attorney
Jim Wells County
P. O. Drawer 2080
Alice, Texas 78332

Dear Mr. Flores:

This is in reference to the August 11, 1975 redistricting of the Commissioners Precincts of Jim Wells County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on May 5, 1978.

We have analyzed the information contained in your submission, comments of other interested persons, and data obtained from the Bureau of the Census in the light of relevant judicial decisions. See, e.g., *Kirksey* v. *Hinds County Board of Supervisors,* 554 F. 2d 139 (5th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3357 (Nov. 18, 1977); *Robinson* v. *Commissioners Court,* 505 F. 2d 674 (5th Cir. 1974).

Although Mexican-Americans constitute 64 percent of the population of Jim Wells County, only one of the four commissioners is a Mexican-American. An analysis of election returns for Jim Wells County reveals a clear pattern of racial bloc voting. We note that a redistricting of the Commissioners Precincts was ordered by a Federal district court on January 18, 1974. We have not been provided information indicating why a second redistricting was necessary only one and one half years after the first. According to the statistics you have provided the 1974 plan contained a total deviation from equal population of 28.4 percentage points; the deviation under the 1975 plan is substantially greater — 40 percentage points.

Under the 1974 plan two of the four precincts had a Mexican-American population; of greater than 65 percent, and a third precinct had a Mexican-American population of greater than 60 percent. Under the submitted plan, the Mexican-American percentage is above 65 percent in only one precinct and is above 60 percent in one other.

Under Section 5 the burden is on the jurisdiction proposing a voting change to show that the new practice or procedure is not discriminatory in purpose or effect. The burden of proof is the same when a submission is made to the Attorney General as it would be in a suit for a declaratory judgment under Section 5 brought in the United States District Court for the District of Columbia. See *Georgi* v. *United States*, 411 U.S. 526 (1973). The Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.19, state:

> If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the sixty-day period, he shall, consistent with the above-mentioned burden of proof applicable in the district court, enter an objection. . . .

Under these circumstances, we are unable to conclude that the county has carried its burden of proving that the submitted redistricting plan for Jim Wells County does not have the purpose and will not have the effect of diluting the vote of Mexican-Americans. Accordingly, on behalf of the Attorney General, I must interpose an objection to this plan.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, the Procedures for the Administration of Section 5, 28 C.F.R. 51.21(b) & (c), 51.23, and 51.24, permit you to request the

Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia obtained, the effect of the objection by the Attorney General is to make the redistricting plan legally unenforceable.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

STATE OF TEXAS }
COUNTY OF BEXAR }

On this 3rd day of August, 1978, I, Joaquin G. Avila, attorney of record in the case styled *Alfredo R. Arriola, et al* v. *T. L. Harville, Et Al,* hereby attest that the factual allegations alleged herein are true and correct, except for those alleged on information and belief which are to the best of my knowledge true and correct.

Signed this 3rd day of August, 1978.

JOAQUIN G. AVILA

JOAQUIN G. AVILA

Subscribed and sworn to before me on this 3rd day of August, 1978, to certify which witness my hand and seal of office.

REBECCA V. GARCIA,

Notary Public

REBECCA V. GARCIA
Notary Public in and for Bexar
County, Texas

My Commission Expires Sept. 1, 1978

(SEAL)

Clerk, U.S. District Court,
Southern District of Texas
FILED
October 15, 1979
BAILEY THOMAS, CLERK
NINA SANCHEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ALFREDO R. ARRIOLA, *et al.*, *Plaintiffs*,
v.
T. L. HARVILLE, *et al.*, *Defendants*
} CIVIL ACTION NO. C-78-87

ORDER

This cause having come to a trial on the merits, the court hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is an enforcement action instituted pursuant to section 5 of the Voting Rights Act of 1965, as amended in 1975, 42 U.S.C. § 1973c.

2. Plaintiffs are residents of Jim Wells County, Texas. Plaintiffs are registered voters and are United States citizens of Mexican descent.

3. Defendants T. L. Harville, Lucilla De Leon, C. W. "Dinky" Price, J. B. Freiley, and W. M. Laughlin are members of the Jim Wells County Commissioners' Court, Texas, and are sued in their individual and official capacities.

4. Defendant Arnoldo Gonzales is the duly elected and acting County Clerk of Jim Wells County, Texas, and in this capacity is in charge of conducting county elections. The County Clerk is sued in his individual and official capacities.

5. Defendant Charles Harless is the duly elected and acting Sheriff of Jim Wells County, Texas, and by virtue of that office is a member of the Jim Wells County Election Board.

6. Defendants Zaragoza Garcia, Jr. and J. W. Southerland are the duly elected and acting Chairmen of the Jim Wells County Democratic and Republican Parties, respectively, and by virtue of that office are members of the Jim Wells County Election Board and charged with the responsibility of conducting party primaries in Jim Wells County, Texas.

7. Defendants Harville, De Leon, Price, Freiley, Laughlin, Gonzalez, Harless, Garcia, and Southerland are sued both in their official and in their individual capacities.

8. On September 23, 1975, the Voting Rights Act of 1965 was extended and amended to cover the State of Texas. States and political subdivisions covered by the Act must comply with certain specified procedures. Among them is the requirement that all qualifications, prerequisites, standards, practices, or procedures with respect to voting different from those in effect on November 1, 1972, must be adjudged by either the United States Attorney General or the United States District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

9. The Jim Wells County Commissioners' Court on July 11, 1975, adopted a redistricting plan for commissioner precincts.

10. On September 2, 1975, pursuant to the request of an Assistant United States Attorney General, Stanley Pottinger, County Judge T. L. Harville forwarded a letter to the Department of Justice. In his telephone request, Mr. Pottinger advised Judge

Harville that if no objection was made within 50 days of the written submission, the new plan could be assumed to be acceptable. The letter informed the Department of Justice that the county had adopted a new redistricting plan but did not describe it in any manner and did not affirmately request the United States Attorney General to evaluate the July 11, 1975, redistricting plan.

11. There was never any response to the letter of September 2, 1975, of County Judge Harville. In addition, the Department of Justice files did not show any correspondence, either oral or written, between Assistant Attorney General Stanley Pottinger and Jim Wells County officials as a result of the September 2, 1975, correspondence.

12. All elections since then have been held under the July 11, 1975 plan.

13. A later succeeding County Attorney, Romeo Flores, the then chief legal officer for the county, reviewed these matters and concluded that he was not able to determine whether or not the reapportionment of the Jim Wells County Commissioners precincts in 1975 had been submitted as required by the Voting Rights Act. He therefore communicated this uncertainty to the Department of Justice on January 18, 1977.

14. On January 18 and 21, 1977, the County Attorney forwarded the 1975 county redistricting plan to the United States Attorney General for section 5 approval.

15. On March 8, 1977, the United States Attorney General requested additional information. Among the items requested was information concerning the population and the number of registered voters, by race or language group, in each commissioner and voting precinct before and after the 1975 reapportionment.

16. On July 15, 1977, the county responded to the Attorney General's request for additional information. Included as attachments to the July 15, 1977, correspondence to the Department of

Justice were tables listing the number of registered voters per voting precinct both before and after the 1975 reapportionment. There were not total population figures by race or language group provided in this July 15, 1977, correspondence.

17. On September 16, 1977, the United States Attorney General requested additional information and reiterated the earlier request for information concerning population by race or language group in such commissioner precinct.

18. On March 15, 1978, the county responded to the September 16, 1977, request by the Department of Justice for additional information. The attachment included with the March 15, 1978, correspondence did not provide a population breakdown by language group in each commissioner precinct before and after the 1975 reapportionment, nor did it state that such information was unavailable as provided in 28 C.F.R. § 51.10(b)(8).

19. The requested information concerning total population by language group in each county commissioner and voting precinct both before and after the 1975 redistricting was never forwarded by the county to the Department of Justice.

20. On May 5, 1978, the Jim Wells County Commissioners' Court's submission of their 1975 county reapportionment to the United States Attorney General for preclearance pursuant to 42 U.S.C. § 1973c was deemed submitted.

21. On July 3, 1978, the United States Attorney General objected to the 1975 reapportionment pursuant to section 5 of the Voting Rights Act.

22. Unless enjoined by this court, Jim Wells County, Texas, will continue to implement the 1975 reapportionment of county commissioner precincts in future county elections, thereby subjecting plaintiffs to irreparable injury.

23. The 1974 redistricting plan for the county commissioner precincts in Jim Wells County was adopted by a federal court

order pursuant to litigation. The county submitted a proposed redistricting plan that ultimately became the plan adopted by the federal court. The federal court did not modify or alter the boundaries of the submitted reapportionment plan that ultimately became the plan adopted by the court.

24. Jim Wells County has not instituted a declaratory judgment in the United States District Court for the District of Columbia seeking approval of the 1974 and 1975 reapportionment of county commissioner precincts as provided in section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Based on these findings of fact, this court enters the following conclusions of law:

1. Jurisdiction is proper before this district court. 42 U.S.C. § 1973c. The Voting Rights Act of 1965, as amended in 1975, applies to Jim Wells County, Texas.

2. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires Jim Wells County, Texas, to preclear all changes in the law affecting voting enacted after November 1, 1972.

3. The September 2, 1975, letter from Judge Harville to the Department of Justice cannot be viewed as a submission, since the letter is a mere notice and furnishes no information on the basis of which an evaluation of the plan could be attempted. It fails to meet the strict requirements of the applicable federal regulations concerning compliance with the preclearance provisions of the Voting Rights Act, *see* 28 C.F.R. § 51.1 *et seq.*, and cannot be seen as constituting even substantial compliance with them.

4. The submission of the July 11, 1975, redistricting of the Jim Wells County Commissioner precincts was not deemed completed until May 5, 1978. On two separate occasions, March 8, 1977, and September 16, 1977, the Department of Justice requested information concerning language group demography in Jim Wells County. A review of the exhibits reveals that this

information was never provided. Moreover, there was no statement that such information concerning language groups in Jim Wells County was unavailable as required pursuant to 28 C.F.R. § 51.10(b)(8). Thus, the 60-day time period stipulated in the preclearance provisions of the Voting Rights Act did not commence until May 5, 1978.

5. The 1974 redistricting plan is a court-approved plan, not a court-devised one, and must be submitted to the Department of Justice for preclearance pursuant to section 5 of the Voting Rights Act.

6. The July 11, 1975, reapportionment of the Jim Wells County Commissioner precincts has not been precleared pursuant to section 5 of the Voting Rights Act and is, therefore, unenforceable.

7. Plaintiffs will suffer irreparable injury by being required to vote pursuant to a change in the law affecting voting that has not been precleared pursuant to section 5 of the Voting Rights Act.

8. Implementation of the 1975 redistricting plan in previous county elections has resulted in a violation of the rights of plaintiffs and their class as those rights are defined by the Voting Rights Act.

9. Plaintiffs are not guilty of any laches in instituting this lawsuit.

10. Plaintiffs are to be awarded costs and reasonable attorneys' fees.

It is therefore ordered that defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with defendants are hereby permanently enjoined and restrained from using the 1975 reapportionment of the Jim Wells County Commissioner precincts in any future county elections unless and until the 1975 reapportionment plan is precleared according to the provisions of section 5 of the Voting Rights Act of 1965, as amended in 1975.

SIGNED this 9th day of October, 1979.

THOMAS GIBBS GEE
THOMAS GIBBS GEE
United States Circuit Judge

OWEN D. COX
OWEN D. COX
United States District Judge

ROBERT O'CONOR
ROBERT O'CONOR
United States District Judge

Supreme Court, U.S.
FILED
SEP 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1954

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR., RICARDO TREVINO, JR.,

Petitioners

V.

T. L. HARVILLE, LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY, W. M. LAUGHLIN, ARNOLDO GONZALEZ, CHARLES HARLESS, ZARAGOSA GARCIA, JR., J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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NO. 85-1954

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR., RICARDO TREVINO, JR.,

Petitioners,

V.

T. L. HARVILLE, LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY, W. M. LAUGHLIN, ARNOLDO GONZALEZ, CHARLES HARLESS, ZARAGOSA GARCIA, JR., J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

Petitioners are submitting this Supplemental Brief pursuant to United States Supreme Court Rule 22.6 to call to the attention of this Court a new decision which was not available when the Petition for Certiorari was filed on May 28, 1986. The new decision is Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, ___ U.S. ___, 106 S.Ct. 3088 (1986) (hereinafter cited as Delaware Valley) which was announced by this Court on July 2, 1986.

1. Status of Proceedings

The instant Petition for Certiorari involves a successful enforcement pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, in Jim Wells County, Texas. The petitioners successfully prevented respondents from

continuing to implement a discriminatory redistricting plan for the County's Commissioners' Precincts. In conjunction with the legal action petitioners actively participated in ancillary preclearance proceedings before the United States Attorney General. As a result of these activities, Petitioners secured their litigation objectives of enactment of a non-discriminatory re-districting plan for the Commissioners' Precincts. Petitioners seek the recovery of attorneys' fees for their work in this ancillary administrative proceeding. Although the District Court (Pet. App. at 38a) denied such an award, and the Court of Appeals for the Fifth Circuit (Pet. App. at 1a) affirmed that denial, this Court's decision in Delaware Valley clearly demonstrates that these lower court decisions were in error.

2. Summary of New Case

Delaware Valley involved an action filed by the Delaware Valley Citizens' Council for Clean Air to require the Commonwealth of Pennsylvania to comply with the vehicle emission inspection and maintenance program as mandated by the Clean Air Act. 42 U.S.C. §7410. Subsequently, the parties entered into a consent decree. The consent decree required the Pennsylvania Department of Transportation to seek legislation which would meet the requirement of the Clean Air Act. Absent such legislation, the Department of Transportation was required to promulgate regulations which would meet the terms of the decree.

The Department of Transportation was not successful in securing the necessary legislation. Subsequently, the

Department published proposed regulations. Delaware Valley submitted comments on the regulations. Delaware Valley also participated in hearings before the Environmental Protection Agency where the Commonwealth unsuccessfully sought to limit the geographical scope of the inspection and maintenance program required by the consent decree.

Although Delaware Valley's administrative advocacy services were rendered after the litigation had terminated with a final decree and were not conducted within the confines of the courtroom, the District Court awarded fees for this administrative work pursuant to the attorneys' fees provision of the Clean Air Act, 42 U.S.C. §7604 (d). Delaware Valley Citizens v. Pennsylvania, 581 F.Supp. 1412 (E.D.Pa. 1984). The Court of Appeals for the Third Circuit affirmed

the award of fees for this administrative advocacy. Delaware Valley Citizens v. Pennsylvania, 762 F.2d 272, 277 (3rd Cir. 1985).

This Court affirmed the award of attorneys' fees for services rendered during these ancillary administrative proceedings. The Court rejected the argument that the plain language of the attorneys' fees provision, which specifically refers to court proceedings and litigation costs, precluded recovery of a fee award for such work. ___ U.S. at ___, 106 S.Ct. at 3094. In rejecting these arguments, the Court noted that the administrative work " was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." ___ U.S.

at ___, 106 S.Ct. at 3094. Moreover, the absence of a traditional judicial proceeding was not dispositive: "[A]nd enforcement of the decree, whether in the courtroom before a judge, or in front of a regulatory agency with power to modify the substance of the program ordered by the court, involved the type of work which is properly compensable as a cost of litigation ...". ___ U.S ___ at _____, 106 S.Ct. at 3095. [1]

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[1] In addition, the termination of the litigation also did not preclude the award for attorney's fees for services rendered in ancillary administrative proceedings. The Court specifically referred to the precedent established pursuant to the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. §1988, permitting the award of attorney's fees for the post-judgment monitoring of a consent decree. ___ U.S. at ___, 106 S.Ct. at 3095.

The Court also referred to the explicit congressional policy supporting the attorney's fees statutes which sought to "insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Laws." ___ U.S. at ___, 106 S.Ct. at 3095. This Congressional policy also recognized the importance of private parties to the effective enforcement of these Civil Rights statutes and the necessity of attorneys' fees awards to permit such private enforcement:

> 'The effective enforcement of Federal Civil rights statutes depends largely on the efforts of private citizens,' and unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed.

___U.S. at ___, 106 S.Ct. at 3095. (citations omitted)

The key concern in Delaware Valley was permitting constituents of Delaware Valley to have a meaningful opportunity to vindicate their rights protected by the Clean Air Act. Vindicating these rights in Delaware Valley required the rendition of advocacy services in ancillary administrative proceedings which were related to the litigation. Without such administrative participation, constituents of Delaware Valley would not have been able to protect their rights, for the consent decree did not finally secure those rights, but merely initiated a process by which those rights could be attained. Awarding attorney's fees for such work permits plaintiffs such as Delaware Valley to secure competent counsel who can represent their interests in such critical administrative proceedings where, quite often, decisions are

made which determine whether such plaintiffs' litigation victory is Pyrrhic or final.

This Court has previously held that as long as the work performed is useful and of the type ordinarily necessary to secure the final relief desired from the litigation, such work before optional administrative proceedings is compensable. Webb v. Board of Education of Dyer County, ___ U.S. ___, 105 S.Ct. 1923 (1985). In recognition of the holding in Webb, the Court concluded in Delaware Valley, "We agree that participation in these administrative proceedings was crucial to the vindication of Delaware Valley's rights under the consent decree and find that compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court." ___ U.S. at,

106 S.Ct. at 3096.

APPLICATION OF NEW CASE TO ARRIOLA

The lower court decisions in the instant case are inconsistent with this Court's ruling in Delaware Valley. The principle established in Delaware Valley authorizes the award of attorney's fees for services rendered in an ancillary administrative proceeding related to an enforcement action under Section 5 of the Voting Rights Act, especially where such services were both useful and of a type ordinarily necessary to secure the final objective of the litigation.

There are many similarities between Delaware Valley and Arriola. In both cases, plaintiffs sought to vindicate their rights protected by a federal statute: the Clean Air Act in Delaware Valley and the Voting Rights Act in

Arriola. In both cases, plaintiffs' preliminary victory in a court action set the stage for administrative proceedings, which would ultimately determine whether plaintiffs attained their remedial goals. In both cases, had plaintiffs not participated in the administrative proceedings, or been unable to marshal the resources to participate effectively and successfully, plaintiffs' litigation victory would have remained a hollow one, without remedial effect.

In at least one respect Arriola differs from Delaware Valley in a way that makes Arriola a more compelling case for an award of attorneys' fees. In Delaware Valley, the litigation had t-erminated when the consent decree was entered. In contrast, in Arriola the ongoing litigation did not terminate with the issuance of an injunction which

merely enjoined the continued implementation of an existing discriminatory redistricting plan, but did not enjoin respondents to adopt a new plan or to remedy their past discrimination. As a result of the injunction, before a new redistricting plan could be implemented, the County was required by Section 5 to submit any proposed plan for preclearance. During this preclearance process, the District Court retained jurisdiction and held the case in abeyance until a new plan received the requisite approval. Thus, in Arriola the nexus between the court proceedings and the administrative proceedings was even closer than in Delaware Valley.

The basic effect of both a consent decree, such as finally terminated Delaware Valley, and a permanent injunction which retains jurisdiction, as

in Arriola, is that they neither require nor support any difference in result. Consent decrees, court orders, voluntary cessation of the discriminatory activity by defendants, and participation before ancillary administrative proceedings are alternative mechanisms by which plaintiffs may accomplish the ultimate objective of their lawsuit. The key issue is whether plaintiffs' participation in these mechanisms resulted in securing the relief they sought. As the two cases illustrate, participation in administrative proceedings can play a critical role in securing the ultimate objective of the litigation irrespective of whether the parties entered into a consent decree. For attorney's fees purposes, it is the result -- not the nature of the proceedings in which relief was obtained, or the timing of the court order -- which

justifies the fee award. [2]

The Court also noted in Delaware Valley that the administrative proceeding need not "involve 'traditional' legal work such as examination of witnesses or selection of jurors for trial" in order to be compensable. ___ U.S. at ___, 106 S.Ct. at 3094. Indeed, the Court affirmed the award of attorney's fees for work performed in submitting comments to regulations proposed by the Department of Transportation. As the District Court noted, this award was proper, even though anyone could have submitted comments on

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[2] Arriola is not a case where Petitioners seek an award of attorney's fees for services rendered in federal administrative proceedings "...when there is no connected court action in which fees are recoverable." Delaware Valley, ___U.S. at ___, n. 5, ___ S.Ct. at 3096, n. 5.

the regulations. Delaware Valley Citizens v. Pennsylvania, 351 F.Supp. 1412, 1423 (E.D. Pa. 1984) ("While it is true that the opportunity to submit comments to the proposed regulations was available to any person, it does not follow, as defendants contend, that plaintiffs should not be compensated for the time used in preparing comments.").

In Arriola, the participation in the ancillary administrative proceeding went beyond the forwarding of comments seeking a change in proposed regulations. Petitioners engaged in extensive administrative advocacy as well as negotiations with County officials during the remedial phase of this lawsuit. The administrative advocacy consisted of extensive comments urging the disapproval of the submitted redistricting plans. In addition, there were telephone

conferences with staff from the Attorney General's office. These telephone conferences provided additional information to assist the Attorney General in evaluating the submitted redistricting plans. Most importantly, this administrative advocacy was successful. See Petition for Writ of Certiorari, at 10-17.

Underlying both the Voting Rights Act's fees provision and that of the Clean Air Act is an explicit congressional policy designed to enable private parties to have a meaningful opportunity to protect their rights as provided by federal law. See, e.g., Petition for Writ of Certiorari, at 24-31; and Delaware Valley, ___ U. S. at ___, 106 S.Ct. at 3096. In both statutory schemes, this vigorous enforcement of statutory rights is encouraged through

the awards of attorney's fees. Therefore, the same Congressional policy which led the Court to allow Delaware Valley a fee award for participation in administrative proceedings which grew out of prior litigation also compels such an award here.

CONCLUSION

In view of this Court's recent decision in Delaware Valley and the arguments presented in this brief and the petition for a writ of certiorari, the writ should issue to review the judgment and opinion of the Fifth Circuit. [3]

Respectfully submitted,

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[3] Alternatively, the Court could vacate the judgment and remand this case for reconsideration in light of Delaware Valley.

ANTONIA HERNANDEZ
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